United States Court of Appeals for the Second Circuit



APPENDIX

75-7600

United States Court of Appeals

For the Second Circuit

COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff-Appellant,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

On Appeal from the United States District four

Defendant FILED FILED FILED APART OF AP

JOINT APPENDIX

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK OFFICE COPY ENTERED

COLUMBIA BROADCASTING SYSTEM

VS.

Before:
HON. MORRIS E. LASKER,
District Judge.

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS & PUBLISHERS, et al.,

Defendants.

Defendants.

New York, May 31, 1973

STENOGRAPHER'S MINUTES

Columbia Broadcasting System

VS.

69 Civ. 5740

American Society of Composers, Authors and Publishers, et al.

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New Mork, New York.
May 31, 1973 - 10:00 A.M.

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(Trial resumed.)

111

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PAUL MARKS resumed.

11

MR. TOPKIS: If your Honor please, before we begin, we were asked yesterday to check into the reporting

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by CTN of use of performances of commercials that were

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put into our data processing with the code number 26.

15

indicating that they were jingles.

16

THE COURT: Right.

:7

MR. TOPKIS: We checked the first quarter of

13

1972, as to which we have been exchanging data generally,

20

it having been the most recent quarter that was available

21

when we began checking records, and we discovered that CTN

22

had reported to us 62 jingles during that period, and those

were six commercials all told performed, a total of 62 times!

23

jingles were all published by J. Walter Thompson. There

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I can say further that according to our records

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member, which suggests, I am told, that the people who wrote them were either employees of JWT or workers for him of some kind or another. If they belonged to BMI we would have known that.

MR. HRUSKA: Your Honor, in the light of that statement, I would like to press a request for a copy of the ASCAF quarterly detail report that Mr. Topkis has referred to. My understanding is that it would take probably less than a half hour to duplicate that tape.

MR. TOPKIS: It is right here.

MR. HAUSKA: You have it here?

MR. TOPKIS: Yes.

MR. HRUSKA: If we could have that, we could check --

THE COURT: Is it a tape or a printout?

MR. HRUSKA: We would like to have the tape, your Honor. It is obviously a lot easier to work with a computerized tape than it is manually by printout.

THE COURT: Maybe f don't understand why it is or why it is so obvious.

MR. HRUSKA: Because the machine can do the tabulations.

IUR. TOPKIS: I am delighted to make this

available to you. Why bother with the tape?

THE COURT: Let me ask you this, Mr. Hruska:

Would you mind looking over what is available at a time when you can and see if it is satisfactory to you. If it isn't, why, then I will be glad to hear why you should have the tape.

CLOSS-EXAMINATION (continued)

BY MR. HRUSKA:

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Q Yesterday, Mr. Marks, on Page 249) of the transcript of your direct examination, you were discussing non-qualified background use, that is, non-qualified musical compositions used as background in the Category 99.

You remember that?

- A Yes, I do.
- Q A question was put to you at Line 16:
- get almost as much as a feature performance?
 - "A That's correct."

That isn't correct, is it, Mr. Marks?

Well, you remember that the credit for nonqualified background is 27.5 per cent for each three minutes. You multiply the 27.5 by 3, you get the figure by which -which indicates the amount that it would get in relation

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to 100 per cent. I guess it is a judgment as to whether that is almost as much as a feature or not almost as much.

Marks. We are talking about a single program, are we, background works used on a single television program?

A That's correct.

Isn't there a limit of 40 per cent of a use credit for background, cue, bridge music used on a single program, non-qualified works?

A Not that I can recall.

Q I guess this is probably more of a test of memory than anything else.

A I am sure it is.

Q There is a provision in the ASCAP weighting formula which strikes me as reading on this --

THE COURT: Can somebody furnish me a copy?

Q Look at Page 9 of the weighting formula.

THE COURT: Fage 97

MR. HRUSKA: Yes, your Honor.

MR. BAKER: The pages are renumbered. It is the last page 9, your Honor.

MR. HRUSKA: Page 9 in my copy.

THE COURT: There are two page nines in this book.

I have it though.

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On my Page 9 there is a clause at the end of a rather lengthy description which says "No work shall receive credit for background, cue or bridge use under this provision," and I might remark here that the provision is dealing with non-qualified works "of more than 40 per cent of a use credit for a single program."

A I think the problem is, Mr. Hruska, that the provision that this applies to is the provision which does not talk about the 27.5 per cent for three minutes, but the provision that talks about the flat 20 per cent of the use credit.

If the particular work used as background has been commercially published for general public distribution and sale --

Q Where do you see this?

A That is on the preceding -- you notice it says at the bottom of the page, "Anything to the contrary not-withstanding," after the discussion of the 27.5 per cent for three minutes?

Q Yes.

A It says:

any nonqualifying work which has been commercially published for general public distribution and sale, or of which a commercial recording has been made as a single for general public distribution and sale, and five feature playings of which have been recorded in the society's local radio sample survey during the five preceding fiscal survey years, shall receive not less than 20 per cent of a use credit for the first performance as background, cue or bridge music on a single program and 2 per cent of a use credit for each subsequent such performance on such program, provided that no work shall receive credit for background, cue or bridge use under this provision of more than 40 per cent of a use credit for a single program.

THE COURT: Is your point, Mr. Marks, that the key words for your purposes are "under this pro-

vision"?

Remember yesterday we were looking at the symbols, your Honor, we had a symbol for a 20 per cent background if it had gotten a certain number of local radio playings --

Honor. The limit is on that provision.

THE COURT: Yes. It is 36, I think.

THE COURT: May I make this suggestion:

today, of course, is the last day that we have allotted

for trial time until we fine some more. This seems

to be such a highly technical legal question that if it

seems significant to the parties I think it ought to be

handled by a memorandum supplemented by affidavit, if

you wish. It seems to me a peripheral question, anyway,

and it could go on quite a long time if we did it by

live testimony.

Q Just to clear this up, is it true that for the same duration of play a qualifying work used as background music will always earn more credits than a non-qualifying work used as background music?

Well, generally speaking, Mr. Hruska -- I
want to make this clear as possible -- generally speaking,

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the qualifying work will, as a practical matter, will receive more credit than the nonqualifying work. That is the purpose of the provision. But you could have a situation where the qualifying work was used for an extended duration --

Q I say for the same duration.

A Yes, but it was a very long duration. It would keep increasing for the nonqualifying work and not for the qualifying work. That is just a — that is a rare — I don't want to give you that, as a practical possibility, but it is possible.

Q But as a general proposition, the nonqualifying work earns less than the qualifying work?

A That's correct, as a general proposition.

On this Exhibit AX233, again referring to code
No. 99, nonqualifying background, there is no amount of
use credits indicated for performances of less than three
minutes.

Could you tell me what percentage of a use credit is earned for the use of a nonqualifying work for a duration of play of less than 18 seconds?

A Generally speaking, it is pro rata to the time. So if it is less than three minutes it is proportional to the time. I don't know what the --

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there is a cutoff at a low level and I don't recall what the percentage is.

Q Would it refresh your recollection to suggest that it is 1 per cent of a use credit?

λ It may very well be. Whatever the formula reads, you know.

Q If a qualifying work is used for less than
18 seconds as background does it retain its 50 per cent
of a use credit earning?

A If it is an identifiable performance of that work it does, yes.

Q So that it is possible that in a short duration of play of less than 18 seconds the qualifying work would earn about 50 times more than a nonqualifying work?

A That's right. If Tea For Two were played for a limited period of time it would still have that recognition that the producer wanted to effect by using that work, much more so than a work that was just written particularly for that program as fill-in.

NR. HRUSKA: Your Honor, I move to strike every part of that answer other than "That's right." I think we are in a situation where Mr. Marks is volunteering far more than the question calls for.

THE COURT: I agree with you that he volun-

harm his explanation did to CBS, nor do I think it does any harm for the Court to have the opinion of the parties involved and leave it there for argument.

MR. HRUSKA: I agree with that, your Honor.

THE COURT: If you ask me to ask Mr. Marks

not to volunteer I will do so.

MR. HRUSKA: I will do that.

THE COURT: I think it will shorten your testimony, permit Mr. Hruska to finish his job.

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BY MR. HRUSKA:

2 Am I right in stating, Mr. Marks, that to maintein qualified work status a song needs to generate 2500 performance credits over a period of five years?

A That is correct.

So that on an arithmetical basis 500 performance credits a year will suffice?

A That's correct, but it's a running addition.
The last five years. One exception there, feature
performance.

THE COURT: You can come off a list?

THE WITNESS: You can come off, yes, you are no longer qualified. These have to be feature performance credits, not any performance credits.

Credits for feature performances.

Q Do you know how many performance credits

are earned by a song for a single feature performance on, say, the Carol Burnett Show?

A Not offhand, but I could guess it might be 600, 700 credits.

THE COURT: For one performance, Mr. Marks?

THE WITNESS: Yes.

THE COURT: Ome performance?

THE WITNESS: That is right. That's a

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feature performance, your Honor.

THE COURT: I understand.

Now, suppose a feature performance of a song
was licensed directly to the producer of the Carol Burnett
Show. Would that use of the song earn any performance
credits under the ASCAP distribution system?

A Can you repeat the question, please?

Q Yes, certainly. Suppose that the use of a song was licensed directly by the copyright proprietor to the producer of the Carol Burnett Show or to the CBS Television Network. Would that song, when used on that show, earn any performance credits under the ASCAP distribution system?

A Under the present system, if we were advised that there were a direct license for that work, the work would not be credited.

THE COURT: Wouldn't there be one possible exception? You mentioned yesterday that you could, for example, leave ASCAP but leave behind, so to speak, whatever repertoir you had licensed to it before that time.

THE WITHESS: Yes, your Honor.

THE COURT: In such a case would arredits
be given? I suppose there'd be no direct liveuse then,
though, so the assumption to your question --

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MR. HRUSKA: Right, I had posited a direct license, your Honor.

BY MR. HRUSKA:

Q Tou said yesterday, as I recall it, that about 80 per cent of the ASCAP moneys distributed to writers were distributed under the four-fund plan, and 20 per cent under the current -- on a current-performance basis. Do you remember that?

A Tes, on the money that is distributed on the basis of those two plans. We put that money together, that would be about the equivalent. Other money goes to writers for awards.

Q Just to make this crystal clear, does any part of that 20 per cent figure include distributions to four-fund writers under the current-performance portion of their four-fund plan?

A Mo.

Q In court yesterday your counsel had a list of ASCAP's top 100 writer-distributees or parhaps beyond 100. Was that a list that is prepared in the ordinary course of your business or was it specially prepared for this lawsuit?

A I really don't know.

Q Have you ever seen a list of writer-distributees

opposed to the current-performence system.

O Mr. Marks, in dealing with a new writer, rela-

their distributions, who are in the four-fund system as

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tively new, who has manifested some signs of being a successful writer of popular music, do you generally suggest that that writer go on to the four-fund system?

A No. I don't generally suggest that he take either option. We try to tell him what the options are and have him make his own determination.

Q What is your opinion? Do you believe that generally speaking it is proferable for a writer in that category to go on to the four-fund system after, say, several years of current-performance distributions?

A I think it is entirely up to the writer's —
to a lot of factors that may not even be present. I
don't think you can generalise, is what I am saying.
I think that the writer will have his own personal economic and other factors to consider in making that determination.

Q But most writers in that category do go on to the four-fund system at some point?

A Oh, I don't know whether you can say that.

Are you talking about a new writer?

Q No, I am talking about a writer who has,
let's say, had two or three good years, the indications
are that he is going to be a pretty strong writer,
enjoy commercial success, and, as I say, he has been on
a current-performance basis for --- what did I say --- two

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or three years -- let's make it four years. At that point in time isn't it true that most writers in that category will shift or will soon shift to the four-fund plan?

A I really don't know. I haven't counted the numbers on that. You may very well be right and you may be wrong. I don't know whether they will shift.

Q You have no idea of that?

A No, I don't. I don't have any idea.

There is an option after three or four years whereby you can come in on a current basis and use your credits again in the average if you shift to the four funds, and I imagine that many writers take that option. I don't know whether the most successful take the option or don't take the option.

Q I didn't say the most successful, Mr. Marks.
I am talking about a --

Mr. Marks simply hasn't studied this question and he doesn't know in the sense that lawyers use that word. He may have a good feel for the situation but ---

MR. ERUSKA: That is exactly what I am trying to find out, your Honor, what his feel is for the situation.

 Q What is your impression? Isn't it your impression that most writers in this category do switch to the four-fund system?

started the question by saying somebody who is quite successful, and he is on the way up, and doing well, is that kind of a person going to switch to the four-fund system after three or four years. I am saying I don't know. I have had go-rounds with writers who, you know, have said, well, they don't want their average; they want to depend upon their current year.

I would say it depends upon the individual, and I haven't really sat down and made a tabulation.

That's knowable. It's knowable, but I don't know it.

Q What is the purpose of switching to the four-fund plan? Why would a writer in this category switch?

A Well, as I say, it may depend upon factors
that have nothing to do with ASCAP but you can look at the
four-fund plan that has an averaging feature, and somebody
might switch because they want to average their credits,
they are concerned about ups and downs.

THE COURT: Wouldn't that be the major factor? I mean, I don't know how you can answer unless

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you have made a study of it, but it strikes me it would be a very important factor for somebody.

THE WITNESS: Yes, your Bosor.

THE COURT: Both from a tax point of view and from the point of view of economic security.

THE WITNESS: Yes, your Honor. I don't know how important it is under the new tax laws, with changes in the rates, but in terms of security, it gives you a longer period over which to have some idea of what your income is going to be.

BY MR. HRUSKA:

Q Let me make sure I understand it. In other words, he is deferring part of his current income to future years?

A No, he is not deferring anything because there is no — he does not put anything away. There is no vested right to get that money in future years. What he is doing is saying, "I want to share in the current fund this year on the basis of what my average credits is."

If he leaves he understands that he does not, he goes on a current basis. He's not deferring anything; he's sharing currently on the basis of the average of his credits, rather than last year's --

get this clear. Let's take an example of a writer who

years his distributions under the four-fund system are,

is on the four-fund system, and for a period of ten

Q Let's take a concrete example so we really

let's say, \$5000 a year on the average less than they would have been had he elected to remain on a current-performance basis. All right? Is that a realistic example, the way?

THE COURT: I suppose it depends upon the scope of the man's earnings as to whether 5000 differ-

MR. HRUSKA: Right, your Honor.

ordinarily 6000 and he got 5000 less --

ential is realistic or not. If the man's earnings were

BY MR. HRUSKA:

Q What I mean when I say realistic, is this something that realistically could occur with some degree of frequency under the ASCAP system as it now exists?

A Well, if you are saying is it possible
that he will make less per year on a four-fund basis than
he would have gotten on a current basis, the answer is yes.
Whether it was 5000 or 500 or, you know, a figure picked
out of the air, I will think about it, if you want.

Q Is a figure like \$5000 a realistic figure?

Are we in a range of magnitude that is way off?

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A Kr. Hruska, it depends. You know, the fourfund system depends upon his average, where it is going, how many performances he has currently in current performance, what his years of seniority are. What the mix would be to produce a \$5000 difference, I don't know.

o I am not asking that, Mr. Marks. I am simply asking in terms of ranges, is a figure in the range of \$5000 realistic in the sense that it could happen with some frequency under the ASCAP system or is the range closer to \$100,000 on one side or 5 cents on the other side?

A Well, now you have changed the question,
haven't you? You want to know whether it is closer to
100,000 or 5 cents, and I would think it is closer to
5000 than it is to 100,000 or 5 cents.

Q Would you agree with me that \$5000, or a figure in the range of 4500 or \$6000 was a realistic figure?

THE COURT: As a differential between what a man, moderately successful man, might earn in one situation or the other.

MR. HRUSKA: Right.

A Again, I have stated that it is closer to that figure than to the other figures you have given me,

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but, you know, I have difficulty sitting here and picturing a few thousand writers on this system and what the difference is. I don't really know and I don't want to mislead you by giving you a figure that I am not at least sure is in the ball park. It certainly is closer to that figure than 100,000 or 5 cents, right.

Q Let's continue with this assumption. This means for a period of 10 years this writer, ASCAP writer, would have earned \$50,000 less operating, as he was, une under the four-fund system than he would have earned on a current-performance basis. If that writer continues in his ASCAP membership and continues to receive distributions under the four-fund system, he does not lose that \$50,000, does he?

A He may or may not, depending upon — first of all I have trouble with your \$50,000. This degree of constancy that you posit I just don't think is there. You are saying it may be there, I am going along and saying it may be there. But you are trying to make this an example of what is, and I am not sure I can agree with you on that.

who is on the four-fund system is, as \$ said, sharing in the current fund. Whether that is going to increase in

his favor or decrease is going to depend upon what the

income of the society is, what the division is between

the current performance and the four funds are.

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Q All right. Let's assume that the ASCAP total distributable income remains constant throughout the rest of this writer's tenure as an ASCAP member. Under those circumstances he will not lose the \$50,000, will he?

Well, in this world that you are projecting ---

Yes, sir.

A -- and taking all your assumptions as being assumptions, even though they are unrealistic, the answer would be that he would cooperate along the same way that he had been doing.

Now we know that, you know, those assumptions are not necessarily true.

Will he lose the \$50,000 under those assumptions or not? I would like a yes or no answer to that question, Mr. Marks.

TIE COURT: I think I can answer that as well as the witness, if we agree that all the assumptions exist. Anybody can. He wouldn't.

Do you agree with that, Mr. Marks?

A No, I am not sure that I can agree. Now what happens?

THE COURT: Why do you need to persuade him if

you persuaded me?

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ded life?

MR. HRUSKA: I withdraw the question.

THE COURT: Let me see, I want to sum this
up, what I get from this exchange, and this testimony is -THE WITNESS: Your Honor, may I add one factor
here?

THE COURT: Wait till you hear all the factors

I am putting in and you can add whatever you think is

necessary.

That someone going into the four funds certainly goes in because, among other reasons, he will average his income over the period of time. If you assume that the fund will produce the same every year and if he stays in it as long as necessary, he will come out even in the end for the flat total of earnings.

I agree with Mr. Marks t hat such an assumpt ion is not necessarily valid if for no other reason than that life just doesn't work that way.

Now I do understand also that Mr. Marks is saying that there is a difference in the economic, legal structure of this system, from what we know of as deferred compensation plans for tax purposes and otherwise because there in a deferred compensation plan, the corporation commits itself legally to make a payment at a later date,

mbb-3 Marks-cross and the employee has a vested interest in that commitment, which is not true in the ASCAP situation. 3 THE COURT: It seems to me that that is the substance of what has been brought out here. If there is anything you want to add, Mr. Marks, for clarification of your position, I will hear it. If there are any other questions you can ask them. If not, go on to another subject. MR. IIRUSKA: Right, there are a couple of more questions in this area. One on the point of the realism of the assumptions.

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Q I would agree with you, Mr. Marks, at least in one sense in which the assumption is not realistic, and that is ASCAP's income has gone up every year, hasn't it, since let's say 1960?

Not from network television.

I didn't ask that, Mr. Marks. Has ASCAP's total distributable revenue gone up every year from 1960 to date?

THE COURT: Does ASCAP's total income affect the amount paid people in the four funds?

MR. TRUSKA: Yes, your Honor, it most definitely does because it affects the cash value of a credit, so that a credit ten years from now would be worth more.

Marks-cross

THE COURT: I am perfectly willing to accept what you say if there is no dispute about that. Do you agree with that, Mr. Marks?

affects the cash value of a credit, your Monor. What someone receives from particular performances in particular areas is very much affected by what we receive from those media, so someone with network television performances is going to be adversely affect if there is a reduction in the network television income.

there might not be negative elements in the formula he is positing. He is simply saying this is one of the positive elements in the formula. Just let's get that isolated fact and apparently that is a fact.

A To answer your overall question, I don't know whether the income has gone up in relation to the price -- the regular inflation is an absolute figure.

Q I didn't ask you that, Mr. Marks. Mr.Marks, that wasn't asked.

A As an absolute figure, the absolute dollars has increased.

THE COURT: I will ask this: What about the membership in ASCAP? In other words, is the larger pie

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The membership has grown disproportionately

split among comparably greater number?

larger to the increase in dollars, your Honor.

Q But the pie isn't split in accordance with numbers, is it, Mr. Marks? It is split in accordance with performance credits?

A Right, and the credits are going to more people these days than they have gone to before.

Q But the cash value of a performance credit has grown during this period of 1960 to date because the ASCAP total distributable revenues have grown during this period, might?

A It has grown in absolute amount, yes. Whether it has grown relatively, I am not sure.

Q So that the hypothetical man who has effectively! deferred this compensation of \$50,000 over a period of ten years could expect to receive back more than that \$50,000 if the ASCAP tot al distributable revenues continue to grow?

A I think that is completely misleading, Mr. Hruska, if you equate \$50,000 with what that is worth ten years from now, and \$50,000 with what it is worth today.

Q I am not equating that, Mr.Marks. We all know about inflation. I am simply asking it in terms of absolute dollars.

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MR. TOPKIS: If your Honor please, isn't this argument really, rather than fact?

THE COURT: I think it is, yes. I think it is. I don't think it makes much difference whether Mr. Marks admits it or doesn't. He is not an economist and he can't say whether it is wrong or right. He is just giving his opinion.

MR. HRUSKA: He certainly cannot in terms of real values with indices of inflation, but --

THE COURT: He has admitted to me what is the critical fact for your purposes, that yes, the receipts of ASCAP are one of the factors that affect the value of a credit, and you are free to argue from there on in what the effect of that is.

MR. HRUSKA: All right.

Now, this member, going back to the assumptions, when he resigns from ASCAP, assuming he were to resign from ASCAP at the end of this 10-year period, he would lose that \$50,000, true?

THE COURT: Can't we say he had lost the right to further income or whatever it is, without arguing whether he had lost \$50,000?

MR. HRUSKA: I just took the figure as an assumed figure.

1 mbb-7 Marks-cross If Mr. Marks disagrees with the assumptions, 2 3 but on the basis of --4 THE COURT: You want to say he had lost the 5 assumed fifty --6 Q We have assumed \$50,000. Let's say we assume 7 X dollars, whatever X dollars is. When he resigns he loses 8 X dollars, right? 9 A No. 10 THE COURT: It is only fair for me to tell you, 11 Mr. Hruska, too, that I think the assumption of a specific 12 sum of money is so unrealistic as to be an invalid assumption 13 For the purposes of trying to demonstrate a mathematical 14 proposition it may or may not be useful, but why should we 15 stand here and quibble and get angry with each other about 15 whether he is going to lose \$50,000 or not. He is going 17 to lose whatever he would have gotten. 18 19

MR. HRUSKA: That is all I am trying to bring out.

THE COURT: I understand that.

MR. TOPKIS: Your Honor, with respect, you are

THE COURT: All right.

MR. TCPKIS: He goes on a current performance

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wrong.

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Marks-cross

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basis and he may win or lose depending on how that works out.

THE COURT: Let's put it this way, he doesn't get from the four funds what he would have gotten from the four funds.

MR. TOPKIS: If he had stayed in.

THE COURT: Yes. But he does get from the current fund.

MR. TOPKIS: That is argument, I submit we are wasting time. This is our last trial date.

MR. HRUSKA: Whatever income was deferred when that man resigns he loses that income.

MR. TOPKIS: Nothing is deferred, your Honor. This is argument. Can't we go to fact?

THE COURT: Yes, Mr. Hruska, I think we should move on from that.

MR. HRUSKA: I raise this, your Honor, because Mr. Marks yesterday in his testimony took issue with a passage from Dr. Fisher's testimony.

THE COURT: I understand the reason that you raised it, but I think that you have elicited all the facts you can and you can argue who is right about it.

Yousaid yesterday that a resigning member, a

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member resigning from ASCAP may leave his existing music in ASCAP. Do you remember that?

Yes, sir.

Isn't it true, Mr. Marks, that to some extent a resigning member must leave his existing music in ASCAP?

To the extent that there are continuing licenses, the music remains for the period of the continuing licenses.

THE COURT: Can you give me an example of what you mean there by "to the extent there are continuing licenses"?

THE WITNESS: Yes, your Monor, we will have license agreements that run for a period of years, anywhere from a year to five years.

THE COURT: You mean to the extent it still has to run?

THE WITNESS: To the extent that it still has to run, his works remain for the period of the license.

To make it crystal clear and also for a basis for further questions, let's assume that member X resigns on date 1, and one year after date 1 all the television network ASCAP licenses expire. For that period of one year, the member's music is licensed -- the resigning member's music is licensed through ASCAP to television netwo: k3

right?

A Right.

THE COURT: In other words, resignation of membership from ASCAP doesn't affect the validity of existing licenses?

THE WITNESS: That is correct, your Honor.

Let's also assume that two years after the date of this resigning member's resignation, all the television station licenses run out, and three years after that, all the radio station licenses run out, and four years after that, the radio network licenses run out.

financially under a four-fund system than he would be under a current-performance system, given the assumption that I just gave you about the staggered expirations of these broadcasting licenses, is that right?

A I don't know how I could tell, Mr. Hruska, where he had been better off or how he had been better off. It would probably depend on a lot of factors, one of which was his inducement to resign.

Q You mean he might have gotten a guarantee in advance from BMI?

A Or he may have -- either one of those -- or performances that earn him considerably more for performances

licerse.

Q What would your expectation be in a majority of cases of writers in this category?

from the media that is no longer covered by the ASCAP

As these broadcasting licenses expire on this staggered basis, wouldn't you expect in most cases that the resigning member's income from ASCAP would go down?

MR. TOPKIS: I am lost, your Honor. Do we really gain anything from this?

THE COURT: Sustained. I think the question is nearly unanswerable. I will sustain the objection to the question. I don't say it is unarguable. I say it is unanswerable.

MR. HRUSKA: Obviously I don't believe that, your Honor, or I wouldn't have asked it.

THE COURT: I understand that.

MR. HRUSKA: But I respect your ruling.

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Who makes the decision --

THE COURT: Let me say this: I don't feel that any light is cast on what Mr. Marks would "expect" in such a highly-contrived --

MR. HRUSKA: It is not that contrived.

THE COURT: -- hypothetical situation as that.

It is contrived in the sense that it simply doesn't exist. I am not saying it is contrived in the sense that you are not working to achieve it.

MR. HRUSKA: I think something like that does in fact exist. I think these licenses or various categories of licensees don't expire all at once, but do expire on a staggered basis.

THE COURT: I assumed by your question that you meant they expired permanently.

MR. HRUSKA: I am sorr y, your Honor. The question was misleading.

THE COURT: That may have been my fault. I don't know what Mr. Marks assumed.

Then what would the relevance be as to whether they expire or not? I don't understand.

MR. HRUSKA: The pertinence is, your Monor, that because these licenses would come to an end of their

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Hruska?

term on a staggered basis, category of licensee by category of licensee, it is realistic to expect that a resigning ASCAP member who must leave his works in the ASCAP pool with respect to these licensees up until the date of the termination of each of these categories of licenses will receive a declining amount of income. If he receives a declining amount of income from ASCAP he would be better under the four-fund system than the current performance system.

THE COURT: Why would he receive a declining amount if there is a new license substituted for the old at what would probably be at least as high a price or higher?

MR. HRUSKA: Because his works are not licensed under ASCAP, through ASCAP, to the licensee under the new license. His works remain in ASCAP only with respect to licenses that were in existence at the date of his resignation.

THE COURT: Let me be sure that Mr. Marks agrees that that is true. If it is true, then you are free to argue whatever you want about it.

Do you understand the last point made by Mr.

THE WITNESS: Yes, your Honor, but I think it

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is based on an assumption which is just unfounded.

THE COURT: Let's make clear for the record what we are talking about.

man has resigned from ASCAP, but some of his works are still licensed through ASCAP because the licenses have not expired, and during the period in which his works are still licensed to ASCAP, the license which ASCAP has given to a, let us say, television network, expires, even if it is renewed thereafter, that is, the television network license is renewed thereafter, the resigned member's works will not earn credits under the new television network license.

Is that fact correct, and if not, will you explain what is the fact?

THE WITNESS: Right. They will not earn credits under the new network television license with ASCAP. They will earn credits under the television network license with the organization that this member has left to go join.

Nobody with works who is a writer is going to leave a particular organization without having some alternative source for collecting his performing rights. Whether he is going to do better or worse is going to depend upon what the totality of his income is going to be as weighed against what it would have been had he not made

the change.

MR. HRUSKA: I want to know whether he is going to do better or worse with respect to the works he leaves in ASCAP, with respect to the licensees for whom he must leave the works in ASCAP.

THE WITNESS: But he leaves those works in ASCAP only for those licensees where the works --- where the license is continued.

THE COURT: Let us take Irving Berlin. He quits ASCAP, has, in his case, many songs, I suppose, but in any case, one song for which you have the right to license for another four years. During that period CTN's license comes to an end. You renegotiate with CTN let's say the end of the second year after Berlin resigned. Berlin will not receive any further royalties throug you under the new CTN license, is that right?

Are you then saying that because of that -- it. is not because of the -- concurrent with the deprivation of such royalties he now has the right to receive royalties or to license that song through BMI or SESAC or whoever?

THE WITNESS: Or directly. That's right, your Honor, it that is his choice. Of course, he can choose to leave --

THE COURT: In other words, in effect, pro

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tanto, as lawyers say, his license to you has expired.

THE WITNESS: Expires with the expiration of the agreement with the licensee.

THE COURT: With the television licensee.

THE WITNESS: With the television licensee. Of course, he could have made the choice to leave the works in and continue to get paid on them even though there are expiring licenses.

We are assuming here though that he has made the choice to remove the work.

THE COURT: Right.

BY MR. HRUSKA:

Q Assuming we are dealing with a member with let's say 100 songs who resigns from ASCAP, who must leave those 100 songs in ASCAP with respect to then existing licensees during the terms of those licenses, and assume that this member's income with respect to those 100 songs and with respect to those licensees and with respect only to the terms of those licenses, realizes a declining annual. income from ASCAP -- assume that -- isn't it true, Mr. Marks, that that member would be better off financially under a four-fund system than he would be under a currentperformance system?

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A How -- if you are assuming that he is going to get a declining amount mustn't you also assume that he is going to get a declining amount under a four-fund system? I don't know what a four-fund system means.

O Is he better off -- and I would like a yes or no answer to the question, because I think it is susceptible of the -- is he better off financially under the present ASCAP four-fund system --

to a yes or no answer, for this reason: Either what you are talking about is mathematically asmonstrable, in which case it doesn't make any difference whether he says yes or not, or it isn't mathematically demonstrable and he may have an opinion about it, but if he does have an opinion he isn't required to say yes or no.

I take it Mr. Marks has been say ing he doesn't have an opinion.

MR. HRUSKA: I will withdraw that question, because I do agree, I think it is mathematically demonstrable.

THE COURT: There is no point in asking the witness questions that are mathematically demonstrable. Their endorsement that 2 x 2 equals 4 --

MR. HRUSKA: The only reason for my doing so,

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your Honor, is sometimes Mr. Marks comes up with exceptions that are buried somewhere in this set of ASCAP rules and I would just like to know whether he sees any exception to this particular proposition.

THE COURT: It would be helpful if you asked an open question of that kind.

MR. HRUSKA: Let me ask this open question.

Who decides, Mr. Marks, whether resigning members are given the choice on the one hand to remain on cithe the current performance or the four-fund system or on the other hand whether they shall be limited to receiving distributions on a current performance basis?

A I believe the amended final judgment has a provision as to the way in which resigning members shall be entitled to receive distribution, and I think the provision indicates that the resigning members may receive distribution on a current performance basis if all recigning members are treated in the same manner.

I am paraphrasing the judgment.

Q My question, Mr. Marks, was who decides cals, the board of directors of ASCAP?

A I think initially a decision was made by the board.

I don't recall, I have no recollection of when

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or where. But as I say, the judgment provides, as it does, that all members have to be treated in the same manner. They can be provided distribution on a current performance basis.

Q Isn't it the fact that the board of directors of ASCAP has decided to limit resigning members to a current performance basis of distribution?

A Well, as I said, I think the board probably made that decision, and the fact is that resigning members are paid on a current performance basis, and it is in accordance with the amended final judgment or decree.

THE COURT: You mean it is in accord with in the sense that this is one of the things that the board of directors is permitted to do or required to do?

THE WITNESS: Well, here I hesitate to testify what the judgment is, but I believe my recollection is, your Honor, that it is one of the things that the board is permitted to do as lon g as it treats all members the same way.

MR. HRUSKA: The point of my question, your Honor, is simply to point out the fact that the board has the discretion under the consent decree whether to put resigning members on one basis or the other and the board has decided to put them on the current performance basis.

Marks?

THE WITNESS: I believe that is what I --

THE COURT: Is that a true statement, Mr.

yes, your Honor, I believe that is what we have been saying.

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because Mr. Topkis mentioned it two or three times

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yesterday, but who in addition to Mr. Bernstein left --Mr. Bernstein left this year, didn't he?

- No. I think it was effective the end of 1972.
- Who in addition to Rimer Bernstein left ASCAP to join another licensing organization in 1972?

A Van Morrison, a very popular young contemporary writer; Leonard Rosenman, who is a successful writer in the background field. As far as I know, they have gone to BMI.

There are others. Goldenberg was also very successful in the background field.

- O Do you remember his first name?
- I am not sure.

MR. HRUSKA: Do you have a list, Mr. Topkis? MR. TOPKIS: No. I just have a list of the top hundred ASCAP writers and those four names are on " it.

MR. HEUSKA: We only have three names.

- Can you think of any others?
- Yes. In the Nashville area we have had two or three or four writers leave and go to SESAC. Nashville is not only big for country now, but it is also a very large, important recording area for pop music as well.

MR. TOPKIS: Mr. Goldenberg's first name is

William Leon?

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Moose.

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Q Can you think of the names of those two or four?

A Richie Mareno. I don't recall the names of the others.

Q Can you think of any other significant writer who left ASCAP in 1972?

A Yes. I am trying to visualize his name. Re is a fellow who has had shows.

Moose Charlap, I believe.

The first name is Moose?

That's the first name. It's a name he would like to be known by, I think.

Q Amy others?

I can't recall offhand.

How about 1971? Can you think of any important ASCAP writers who left ASCAP to join BMI in 1971? MR. TOPKIS: Before we go to 1771, could

I record that his mother knew Moose Charlap as Morris Charlap.

THE COURT: Ny mother does not know me as

Now we can go to 1971.

You are beginning to tax my recollection, A

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Mr. Hruska. The years rather fade together. But we certainly have a list of writers who left ASCAP.

MR. HRUSKA: I would like very much, your Bonor, to have that list for 1971 and 1970, and also 1972, and with it I would like to get an indication, in we may, of whether the writer in question was on the four-fund system or on a current-performance system, and in confidence, the amount of his earnings.

THE COURT: Why do you need the names?

Why do we need the names, your

THE COURT: Yes, if you get writer A, B, C,
D, E earned X dollars, was on the four-fund system.

MR. HRUSEA: Because we would like to find out how much they were paid by BHI to come into BHI, what kind of an advance they received, what kind of a quarantee they received.

MR. TOPKIS: Your Honor, do we really want to litigate that in this case?

THE COURT: I don't understand when you will find it out. Suppose BMI puts in no case?

MR. TOPKIS: I suppose if there is more dsidiscovery --

THE COURT: There has either got to be

covery or cross examination. 2

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MR. HRUSKA: Your Honor, the point of this is simply that Mr. Marks on direct examination gave an opinion to the effect that ASCAP writers were under no real financial inducement --

THE COURT: Yes, he did, Mr. Hruska, and it seems to me that if CBS is pushing this point as strongly as you have made me feel today in the cross examination you are, it was your obligation to get this information and prove it at the time that Dr. Fisher testified.

MR. HRUSKA: I think we made out our prima facie case on this point based upon Dr. Fisher's testimony and the ASCAP weighting rules and distribution formulae. Mr. Marks has expressed opinions.

THE COURT: So did Dr. Fisher express opintons.

MR. HRUSKA: Yes, of course, but we believe Mr.Marks' opinions can be even further rebutted by these actual facts. He testified that posple were leaving ASCAP to join BMI and BMI didn't have a four-fund system and this demonstrated that these writers were under no real inducement to stay with ASCAP.

THE COURT: He then went on to say that obviously there was some inducement or else they wouldn't

MR. HRUSKA: Some inducement to go to BMI?
THE COURT: Yes.

MR. HRUSKA: We would like to be in a position to show the quantitative extent of that.

THE COURT: I will take that under consideration. The reaction to the request is negative at the
moment.

MR. HRUSKA: I should point out that we also have, I believe — it was asked for and I believe the documents were produced — contracts between BMI and a number of writer-members. The names furnished by ASCAP may fall within those so we may already have the information.

have the information from BMI, I will ask ASCAP to give you the information they have about that man or woman.

But I am altogether hesitant to reopen any subject for major discovery unless I think it is critical to the case.

I think this is an important point, but I don't think it is critical.

MR. HRUSKA: I absolutely agree it is not critical. There is no question about that.

THE COURT: If I knew that BMI offered a

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particular writer \$20,000, or whatever kind of an offer, it wouldn't prove to me anything more than the they had offered him semething. I suppose they would have to offer him semething.

MR. HRUSKA: Yes. I think we could arithmetically learn the extent to which a resigning ASCAP member gave up deferred compensation and match that against the BMI guarantee or advance.

handle it is for you to check whatever information you already have from BMI. I will go so far as to ask . ASCAP to secure the information about the resignation — I don't even know if you need it; you know he resigned if he went to BMI, I suppose — anyway, whatever correlative information you need on a limited basis there.

MR. TOPKIS: Before we get too deeply into that, your Honor, in response to an interrogatory we gave counsel for CBS .. list of everybody who resigned from ASCAP for 10 years.

MR. HRUSKA: Through 1969.

MR. TOPKIS: Through 1969, right. That

is what was asked for.

MR. HRUSKA: That was in April, 1970.

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MR. TOPKIS: Mr. Marks was under deposition for four days.

THE WITNESS: Four and a half.

MR. TOPKIS: Four and a half days. I certainly will most grudgingly respond to all kinds of requests for information about everybody who resigned from the society since the year 1.

THE COURT: If it gets to be that large in scope I wouldn't impose that burden on you anyway, even if you hadn't done what you have done. My impression from what Mr. Hruska has said is that he has gotten a certain limited number of names from BMI and I therefore felt that it would not be a burden on ASCAP.

MR. TOPKIS: A handful I won't mind.

THE COURT: Let's find out what we have.

MR. HRUSKA: Yes. We don't have the names of people who have resigned from ASCA? to join BMI. We have contracts -- at least, we should have contracts, because there was a discovery request that was ruled on in our favor, and I assume we have it -contracts between BMI and certain of its writer members.

I am wrong about that. Maybe it's the publisher members. I am sorry. I thought we had

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a recess.

THE COURT: I think we will have to stand on the record as it is under those circumstances ...

Gentlemen, I think it is a good time to take

(Recess.)

contracts from writer members.

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MR. TOPKIS: I might say, your Honor, that we checked during the recess, and I can advise the Court that of the top 100 ASCAP writers in terms of revenues received in the year 1972, 19 were on the current-performance basis and 18 were on the four-fund basis. Since four of them, I believe, had resigned during the year, that perhaps explains why four of them were on current performances, although I don't know.

Perhaps they were on current performance all along.

MR. HRUSKA: I think in the light of that statement, your Honor, we should have a listing — may I just inquire of Mr. Topkis whether he is reading from the top 100 or top 50 list that was provided to CBS?

MR. TOPKIS: Not the top 50. We gave you a list of the top 50. I have here a list of writers' distribution earnings from high to low.

MR. HRUSKA: Whether they are current-

MR. TOPKIS: Without regard, range in income starting from the highest and going to the man who got \$10.03, or whatever the figure is.

MR. HRUSEA: May we ask your Honor for

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MR. TOPKIS: No. I will object.

THE COURT: Are you objecting on the grown of burdensomeness or confidentiality?

MR. TOPKIS: No, it is here, confidential-

MR. HRUSKA: We can put in a protective order.

MR. TOPKIS: Your Honor, again, we have had discovery in this case.

THE COURT: Sometimes the convolutions in this case really leave me lost. What are you trying to get across to me? Why do you need that to ic it?

MR. HRUSKA: Well, basically, your Honor, we are trying to get across the fact that in the ASCAP distribution systems and plans there are some very, very strong inducements, financial inducements, for writers to remain in ASCAP and not resign. The only reason we are getting into it this heavily this morning --- because I quite agree with your Honor's statement a little while ago that this is not a critical area of the case -the only reason we are doing this is because of Mr. Marks' testimony yesterday which created some impressions about those inducements, and -

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THE COURT: I frankly did not take Mr.

Marks' testimony as being anything but a disagreement
on his part that Dr. Fisher's conclusions were demonstrably clear-cut and he comes to a different conclusion.

fund sysrem. I think by now I am pretty well educated on it. Mr. Topkis has just told us that of the top 100, whatever the reasons were, there are only 19 of them on a current-fund basis and there are 81 that are not, so I don't see how much more proof you need to be able to argue what you have in mind, unless you feel that —

MR. HRUSEA: Well, for one thing we had gotten evidence previously in the depositions that the mumber or the percentage of the top 100 writers in the four-fund system was even higher than that.

Now, I would not have asked for this list but for the fact that Mr. Topkis made a statement about what it contained. I have no way of looking at all the facts and taking that statement —

THE COURT: Let me say I now, now that you remind me and mention the figure of 90 to 95 per cent.

MR. HRUSKA: Yes, your Honor.

THE COURT: Unless sumsbody comes along to

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BY MR. HRUSKA:

give me some reason to the contrary, I will consider 80 per cent to be as significant statistically as 90 per cent for the purposes of the argument have.

MR. HRUSKA: With that understanding, your Bonor, I will withdraw my request.

THE COURT: If ASCAP contends now there is some magic breaking point at which it doesn't make any difference if it is 80 per cent but it makes a difference if it is 90 per cent, that is another matter.

MR. TOPKIS: I mentioned it only, your monor, so we would have the exact figure rather than have some --

MR. HRUSKA: But I don't know that is the exact figure, and Mr. Topkis has just checked this quicily over the break, but with your Honor's statement I don't think it makes any difference.

Q I want to make sure Mr. Marks, that the record accurately reflects the facts on the continuity fund feature of the four-fund plan.

Am I correct in my understanding that the distributions from that fund are based on two factors, one, the writer's 10-year average of performance credits and, two, the length of his membership up to 42 years?

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A Generally speaking, that is correct. It's not the 10-year average, though; it's the average of the annual ratings, and the annual ratings are computed in the same fashion that the standing in the average-performance fund is computed.

Does that mean, for example, that if a member had performances during a period of 10 years, let's say had an average of 10,000 performance credits a year average, and then went for a period of nine years in which he did get any performance credits at all, he would still receive distributions?

A Well, since there are 10 years of annual ratings that are averaged in the picture, if he has two years of annual ratings in the picture, then he will get the distribution that is called for by making the computation that is required under the provision.

- Q so the answer to my question is yes?
- A I am afraid I have lost your question in my answer.
 - I will be happy to repeat it.

THE COURT: Mr. Reporter, will you read the question back.

Because I would like to know if you can asswer it yes or no.

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(Question read.)

If by that you mean that there is one year in there with performance credits, then the answer is yes.

THE COURT: If in the tenth year he got some performance credits he'd get something?

THE WITNESS: I am trying to listen to your question, your Honor. I think what Mr. Hruska said was, in the last nine years he did not have any credits.

THE COURT: That is right.

THE WITNESS: But in the preceding 10 he did

THE COURT: That is right.

THE WITNESS: And if in the conth year he had a credit --

THE COURT: In the second tenth year you mean, at the end of the -- after the --

THE WITNESS: No, in the --

MR. HRUSKA: The 19th year.

THE COURT: Let's put it in terms of chronology. If from 1950 to 1960 he had credits all the time --

MR. HRUSKA: In every year.

THE COURT: In 1960 to 1969 he had no

credits. In 1970 he did have credits. Would he

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receive something?

THE WITNESS: Yes, if we were making a distribution in '71 or whatever the time period is, $y_{\rm CS}$, your Honor.

BY MR. HRUSKA:

- Q In 1969 he'd receive distributions even though in 1969 he had no performance credits?
- A You mean assuming that there was one year in the annual rating where he had credits, yes.
- Q Let me do it again because I don't think it is quite clear yet, your Honor.

make the slighest difference? We are trying a lawsuit here, not a guessing game, aren't we? I haven' heard anything but a hypothetical question in the last hour.

MR. HRUSKA: This is not in actuality a hypothetical question.

THE COURT: Go ahead and ask the questicn.

It's quicker than arguing it all out.

Q Between 1950 and 1960 this writer carned performance credits every single year. In 1961 he earned no performance credits. He is under the four-fund system. Will he or will he not receive

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THE COURT: From the continuous fund

part?

MR. HRUSKA: Under the continuity fund,

right, your Honor.

A In '61 he got credits?

THE COURT: No, he did not.

- A He did not get credits?
- Q Right.

A But he got credits in the preceing nine years?

THE COURT: Preceding 10 years.

- Q Preceding 10 years.
- A Yes, he will get distribution in the continuity fund.

Q That is true of every year from 1961 through 1969, right?

THE COURT: That he will get something?

MR. HRUSKA: Yes, your Honor.

Q Even though in all of those years he had no performance credits.

A Each year the fund shifts. In other words we pick up a year and drop a year. If in the preceding to years, if that is what you are positing, I will agree

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with you, if in the preceding 10 years.

THE COURT: That is all he mants you to posit.

Q That is all I asked.

Now, yesterday you gave some testimony on direct about the flow-down. Let me ask you first, Mr. Marks, whether Exhibit 10 to the CBS-ASCAP stipulation, which was received in evidence as the Court's Exhibit 2, reflects the current ASCAP rules with respect to the flow-down.

THE COURT: With respect to what?

MR. HRUSKA: Of the flow-down.

MR. TOPKIS: Exhibit 10 is the amended final judgment, I believe.

MR. HRUSKA: It must be 11.

MR. TOPKIS: 11 is the Pebruary, 1972 ---

MR. HRUSKA: I am sorry.

(Paper handed to witness.)

THE COURT: Is that the same thing I

have here as 216 for identification?

MR. HRUSEA: Is it also 216 for identification? I think it was actually received in evidence, your Honor, as part of the stipulation.

THE COURT: It was. I just happen to

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1 Marks-cross 2584 mba have this sopy here and I wonder if it is the same. 2 3 MR. BAKER: It's the same. 4 THE COURT: All right. 5 I am not sure whether this reflects the 6 latest provision as to the flow-down. There was a change made in the past few years. I don't know whether 7 3 it was incorporated in this booklet or not ... 9 O There wasn't a change made wit in the last 10 several months? 11 A There was a change. There was a recent 12 change, the last -- I don't know whether it is seven 13 months. 14 Several months? 15 Several months? 16 Q Yes. 17 No, not several months. A 18 Might have been within the seven-month Q 19 period? 20 THE COURT: Come on, gentlemen, you know what you are talking about. When was it? 21 22 MR. HRUSKA: I don't know. That is

> A This is a document that goes to the membership whenever there is such a change.

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why I am asking.

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THE COURT: When was it, Mr. Marks?

THE WITNESS: I don't remember, your Hoper There has been a change. This one speaks in terms of '68, as I look at it, and I think there is something more recent.

MR. EKUSKA: I did not know, your Honor.

I have just been advised by Mr. Collins that he believ s
it was in October of 1972.

- Q Does that refresh your recollection?
- A That's very possible, yes.

THE COURT: Are you trying to get the prosent provisions before me? Why don't you just agree
that you will make it evailable in the present language, whatever it is.

MR. TOPKIS: Be delighted, your Monor.

MR. HRUSKA: I just heard for the first time, your Honor, that there was something more current than the provisions in that book, and since there was testimony about the flow-down, I thought there ought to be a current version.

BY MR. HRUSKA:

Q Let me just ask you one more question on that flow-down change, and was that a reduction in the amount of money to be flowed down?

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A Yes. The effect of the change was to reduce the amount of the flow-down.

And just so it is clear, under the flowdown provisions of ASCAP, is any money flowed down to writers or the current-performance basis of distributions?

A No, it is within the four-fund system.

(PX440 marked for identification.)

I would like to show you PX440 for identification. This is a list, Mr. Marks, wanted was supplied
to us by your accountant of the top 50 publisher entities
in ASCAP listed in order of their distributions.

THE COURT: It seems to include a lot more than 50, doesn't it?

of years, your Honor. It starts with 1967 and then you will see on page 2 there is a break in '63 to '70.

THE COURT: I see. All right.

MR. HRUSKA: These are not publisher groups, your Honor, these are individual entities.

MR. TOPKIS: They are typically publisher groups, at least at the top. You have the run.

MR. HRUSKA: I have the run, yes. We ware also supplied with a list of the top 14 publishes groups.

This is a different document.

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Marks, Warner Brothers-Seven Arts. I won't read the amount of money distributed to Warner Brothers-Seven Arts, in the record, because that is covered by the protective order, but I would point out to you, Mr. Marks, that there is shown for Warner Brothers-Seven Arts zero credits, and a substantial amount of distributions.

other publishers who have either zero credits or very, very small amounts of credits, and relatively substantial distributions.

Could you explain to us how it is that a publisher on this list with zero credits can receive ASCAP distributions?

A Mr. Hruska, I think this illustrates my problem with data processing people. I don't have the foggiest idea how this zero credits --

THE COURT: Miss Kearse?

MISS KEARSE: Excuse me, your Honor we have not been supplied with a copy of this document. I gather it is subject to some sort of protective order.

of direct licensing, which he intends to affect BHI, we

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ought to be able to see a copy.

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THE COURT: Of course. I gather this is sail. on the question of what the effect of the ASCAP structure is on members leaving. Is that right?

> MR. HRUSKA: It relates to that your Honor THE COURT: It is offered for that purpose? MR. HRUSKA: Yes.

THE COURT: Is it offered for any other purpos ?

MR. HRUSKA: Well, there are a number of purposes to which a list of this nature can be put once the list is understood, and we have here this problem of comprehension of a list based upon the zero credits and the substantial amount of revenues. I thought since this : 3 '1' Mr. Marks' area or at least I believed it was, that he could enlighten us.

THE COURT: I am not talking about the uses to which it could be put, but apparently this wasn't given to BMI for the reason I assume that A CLP doesn't want BMI to have information about its affairs,

MR. TOPKIS: Absolutely.

THE COURT: And I would prefer not to have deal with that delicate issue if it can be voided.

MR. TOPKIS: I can tell the Cours why this

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happened of zero credits. Warner Brothers cer ged --

haps to an answer from the witness. Am I correct, Mr.

Bruska, that what you are trying to prove menely has to co
with ASCAP here and does not have to do with the subject
of direct licensing as such?

MR. HRUSKA: Did your Honor say did or did to .

THE COURT: Does not have to do with the subject of direct licensing as such.

MR. HRUSKA: No, I am afraid it does relate to.

THE COURT: Will you explain how?

MR. HRUSKA: Yes.

THE COURT: Without referring to any figures.

MR. HRUSKA: Yes. Right. One of the purposes of a list of this nature is to indicate concentrations with the group of publishers. The significance of concentration among publishers is based upon the economic principle that publishers with a large stake financially in an on-going will tend to protect that stake, recognize that stake and protect it against threats to the system, perhaps more than publishers with a lesser stake.

of talking about the fact that the ASCAP structure is such

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that you contend it makes people stick with ASCAP, but it doesn't -- this document doesn't seem to me has anything to do with what your direct license system would be if there were a direct licensing system.

MR. HRUSKA: Bypass, your Honor.

THE COURT: No direct licensing, per-use plus direct licensing.

MR. HRUSKA: Right.

you are going to argue anything here from this document that will affect the interests of BMT as BMT?

MR. HRUSKA: I don't believe so.

THE COURT: That is what I was going to bring

MR. HRUSKA: I am sorry to have nisunderstood.

THE COURT: Because Miss Kearse said if her client's interest was affected by what you intended to argue from this document, she would be entitled to know what it is all about, as she probably would, or she well would. I don't want to give her ASCAP's material if it isn't necessary.

MISS KEARSE: I thought I just understood

Mr. Hruska to say though, your Honor, that this questioning
is going to the issue of direct licensing.

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I think what he said was he is trying to show what a concentrated entity ASCAP is, how hard it would be for some body to start a rival organization, in other words, to validate Dr. Fisher's opinion on that subject. And it doesn't seem to me, I will be open to say, that even if you proved that vis-a-vis ASCAP, you proved it vis-a-vis BMI.

MR. HRUSKA: I think that is true.

ically in putting ASCAP on a per-use basis, if the issue depended upon that point, and the same wouldn't necessarily apply to BMI.

Miss Kearse, I have this question in mind, and you do too, and if we seem to be veering in a wrong direction.

I will have to do something about it. At the moment I am satisfied we are only talking about the question of whether Dr. Fisher's opinion about ASCAP is sound or not.

MISS KEARSE: As long as it is understood that this is not to be used against me at all.

THE COURT: I do so understand it, and I preclude its use against BMI, unless I am advised during the course of your questioning that you do intend to use it against BMI.

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MR. HRUSKA: Well, I should ---

have just said. I have just told you that I don't think you can demonstrate that BMI is -- what should I say, I don't know what adjective to use -- but the degree of concentration of BMI or its results are necessarily affect in any way by what you prove about ASCAP.

MR. HRUSKA: That is true.

MR. TOPKIS: I would like to know where we are going to go with this because I think the whole document is irrelevant. It is certainly true that there are bigger and smaller publishers in ASCAP. So what?

THE COURT: I think Mr. Hruska is entitled to try and prove this here and you can argue that it is a lot of petty business.

MR. HRUSKA: Your Honor, we are wasting a great deal of time. All I am trying to find out from the witness is sor thing that I believe from what he said before he probably doesn't know, and that is why.

THE COURT: That is very likely true.

Q Why is there such a great disparity here in th 3 list between distribution amounts and credits with respect to a number of these publishers?

Well, I can state categorically, Mr. Hruska, ch :

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it would have to be an error in the listing.

THE COURT: You mean there is no situation in which somebody has no credits and yet earns a large amount of money?

THE WITNESS: That is correct, your Honor.

MR. HRUSKA: I guess we can take up with your Honor then at a later time receiving from ASCAP listings from which these errors are corrected.

MR. TOPKIS: If your Honor please, I would suggest that counsel inquire of his able associate, Mr. Baker, to whom all of this was explained many months ago.

MR . BAKER: I would simply like to state on the record that that is news to me.

THE COURT: All right, gentlemen, please letter go ahead with questioning witnesses. We have so limited an amount of time.

MR. HRUSKA: I will pass, your Honor, the same questions I would otherwise have put to Mr. Marks concerning the list of the top 100 writers in the current performance system.

You said I believe on the first day of your testimony, Mr. Marks, that from time to time you confront to a radio station which did not have an ASCAP license, and

you recall that?

A No, no, I think what I said was that from time to time we find that there are stations that don't have ascap licenses, they may be new stations, they may be transfers, they may be new licensees of the FCC. We context them, let them know about ASCAP, the availability of the license, and usually subsequently license them.

does that mean when you have to work out something with a transferse, that the license that you give to, let us say, the WQXR Corporation, or the owner of a radio station, does not go along if he sells the radio station to someboly else?

A I'd have to defer to counsel on that one, your Honor. I really don't know the answer.

Q My question on this, Mr. Marks, is, don't you in effect give a radio station the opportunity to sign the then existing agreement which ASCAP has worked cut with the all-industry radio committee, and give it to the station on a take it or leave it basis?

A That is one of the options that station has, that is, to sign that agreement or to go to the District

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Court and have a fee set, or to sign no agreement at all.

Q That is true also of the television stations:

A I believe so.

Q You do offer the television station the then existing local station television license which ASCAP has negotiated with the all-industry television committee?

A That's correct. That is the license that is offered.

or the television station a fee which differs from the fee which you have negotiated with the all-industry radio committee or the all-industry television committee, true?

A Unless it is a kind of use that was adverted to yesterday, the all-talk station.

Q That is negotiated? That is not negotiated with the committee?

negotiated with the commit tee. It may have been negotiated with the commit tee. It may have been negotiated with a station that has an all-talk format. But the station has the option of going to the District Court, as some stations have done -- as was pointed out yesterday, there is a matter before Judge Ryan, the Georgia Broadcasters, where asked for a different fee other than that provided in

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the all-industry license.

I simply want to know ASCAP's offer and is my understanding true that ASCAP's offer is "Here is the all- neasury license, take it or leave it"?

A No.

Q The answer is no, only because c the possib : exception for all-talk licenses?

A No.

variety in the offers that you make?

THE WETNESS: The station has the opt in to sage that license.

have. We are asking what difference there is in the offers that you make to various people. Do ou say to that "You can have the contract "A" or you can have Contract "D," or do you negotiate a contract from scratch or do you, "If you want a contract from us, this is the only contract we have to offer; this true that if you don't want this contract with us you ar go to the District Court or you can have no contract"?

Is the latter what you say?

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it. What we say is this is the contract.

THE COURT: It seems to me the answer to Mr. Hruska's question is the only contract you offer is a standard contract, is that right?

THE WITNESS: That's correct, 70 m Lonor. I is the standard contract for lice es per-gregren.

or wired music services and AM233 lists four such compan s.

Muzak, Seebur g. Customusic, and Magne-Tronics. Are you

aware of any other wired music services?

am aware that there are other wined music services. I don't know the names of them. If am not so e I can give you the names. There are other wined music services.

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Q Can you think of any other sig it ident ones?

A IM -- it is similar services. 3% is an examp s,

Q F.ny others?

A It depends upon what you mean y significant.

CBS has a wired music service, I believe, r did at one to well

Q They did at one time, yes. They do not any more.

A They do not.

Mhat are the related services? Bet me explain my question. There is a category in the ACCP distribution report, royalty report to members, which is entitled wired music and related services. What are the related services other than 3M?

A Well, that would refer to the first that whereas some of these services provide music to the establishment by means of wire, other services provide music to the establishment by means of a tape or disk that is used at the establishment.

In other words, it is a similar type of use. It maynot use a wire communication.

O Do you recall whether in 1964 there were any companies of that nature of significance?

A 1964?

Q Yes.

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Marks-cross

- A I don't recall. Seeburg may have heen.

 Companies of what nature? I am sorry.
- Q In this category of related services as distanted uished from wired music per se.

A I think Seeburg had a system at that time will a was an in-establishment system rather than a wined system.

But my recollection is not clear on that.

Q This is in addition to the Seelary wired much system?

A I think it may have been. I think it may have been, in fact, the primary source, the way in whice Seeburg operated.

THE COURT: Where do juke boxes fit anto all this?

MR. HRUSKA: You just touched on a very sore point.

THE COURT: I assumed I had.

MR. HRUSKA: There is a juke box exemption.

THE WITHESS: In the Copyright Ac:.

THE COURT: You don't collect inything on july

boxes?

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your Honor, unless there is an admission price at the

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establishment, and that is by reason of the Copyright Act.

coin-operated devices. I think originally when the Act we written it had in mind planolas that were in ball. But since that time the juke boxes were developed.

THE COURT: Sounds like CBS should go on coin television.

THE WITNESS: I am sure they have abought of it.

music receiving more in respect of performances of their works than writers of popular music, non-serious music, or directive for an equivalent number of performances.

of the total fees paid annually by television networks
to ASCAP goes to that increment that serious writers recail it

- A No, I don't.
- Q Is this a calculable figure?
- A I don't know whether it is exactly calculable.

 Maybe an estimate can be made.

MR. HRUSKA: Let me pass that and go on. May! this is something we can work out with coursel.

Q You talked about infringement actions that ASC:

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brings on behalf of its members.

Do you know whether ASCAF receives actorneys

flees from the defendants in the cases that ACCIP wins,

that is, receives attorneys' fees uncer the logge the Lav

- A If you are asking me whether the receive attorneys' fees in every case, I don't know. If you are asking whether they receive attorneys' fees in some cases a believe they may have. But I don't blink I am the one who are really answer you authoritatively to that.
- thought, authority, on the proposition that SCAP loses money in these infringement actions even when the, win them and I am wondering, in the light of the provision of the Copyright Law which provide for attorneys' first I cases which you win, how that could be so.

Maybe you could explain that.

- A Well, you recall that I said that if we do receive attorneys' fees or have, I am not sure the extent to which we had.
 - Q I didn't recall that.
- A You might read back the testimony is seem is some question about it. But what I am talking about -
 THE COURT: I must say I really don't think
 that the case turns in the slightest degree on another thay

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made money on infringement suits or lost money on infring .

ment suits. I don't think you need to worry about it, A.,

Hruska.

MR. HRUSKA: All right.

- O Mr. Marks, are you familiar with the outlines of the per-use system which CBS has put forward in this case?
- A Well, I followed from time to time the outlings
 that have been put forward, but I think they have been
 changed a number of times and I am not sure that I am up
 to date on what the current outline is.
- Q Have you attended any of the Court sessions here?
- A Yes, I attended one day last week, think it was.
 - Who was the witness then?
 - A Walter Dean, Marion Preston.
- Do you have any basis for believing that their rhe:
 for the licensing of performance rights to television notworks would not function under that system?
- MR. TOPKIS: Your Honor, the vitners has said that he doesn't know what the system is. I find it difficult to understand how he could have an opinion.

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MR. HRUSKA: Then he could answer the question

THE COURT: I think to keep the record clear and have the answer be meaningful you better give a stand dishypothetical.

Assume, if you will, Mr. Marks, that ASCAP
in this action is directed to grant the CBS television
network a form of license which would have these features

of the ASCAP pool, let us assume for these purposes the index of ASCAP music of performed works. For unat licen cash would pay to ASCAP so many dollars and cents for each use and that figure or those dollar figures would be arrived at either by negotiation between ASCAP and CB3 or would be set by the Court.

Assume also that ASCAP members copyright proprietors, rather, would have the right to pill their music out of that per-use license and that they would have that right on reasonable notice given by them to CBS.

Assume that the form of notice sent to the copyright proprietor would have a provision on it whereby the copyright proprietor who pulled his music from the per-use license could fill out the name of some person

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either on his own staff or some agent who would be set up by the copyright proprietor to license the mission directly.

vision Network would take all the notices that came to it from copyright proprietors and fed the data on the notice into its computer system, names and telephone anabers of people who were set up to deal directly and the songs of which they were set up so to deal.

the job of music performance rights licensing over to the packagers of CTN programs, gave them a budget for lat purpose which would be in addition to the package price, and program packagers assumed that responsibility.

Now, under those circumstances, to you think
this market -- and I will limit it to CBS -- between C S
and program packagers on the one hand and ECAP and copys to
proprietors on the other hand would function:

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A Well, Mr. Hruska, I am a little troubled with your word "function," aside from some of the other terms.

Q Let me make it clearer for you. Function in the sense that there would be sufficient transactional opportunity between, on the one hand, the suppliers of music and, on the other hand, the program packagers, so as to permit the packagers to fill their requirements.

that the performance of music would be about the same as it is in the present — under the present circumstances, that is, that the performance world that you posit would be about the same as it is now, I don't think that would be so. I think that what would happen is that CBS would create a situation where you have a nonuse of music as compared to the use of music at the present time, and by creating a price list against which you ask the individual copyright owners to compete I think you are creating the type of world where you can reduce the cost to CBS, but I think that would have a very adverse effect on the use of music on the CBS Network, that is, it would be a very different use picture than it is today.

O Please describe those differences.

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MR. TOPKIS: Hasn't the witness done that already?

THE COURT: So, I don't think he has.

A I think, as I said, instead of having a situation where music is used on the basis of what the feeling is that the public would like to hear, in other words, instead of putting to the fore what — the value of the music used in terms of the program values, instead of having a producer or a director pick a piece of music because that's what is goint to be the best for that particular program, I think that you are going to have a situation where the feeling is that you have to come back and show that you saved a good deal of money on your music use, so that instead of picking what the best music is for the program, you are going to have the incentive to reduce the music for the program.

THE COURT: I understand that.

BY MR. HRUSKA:

Are you assuming in your answer, Mr. Marks, that the packagers of television programs under this system will deliberately injure their programs by choosing music of one category over another?

THE COURT: Rather than get into an argn-

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ment about opinions, which it seems to me you are very likely to do, let me ask Mr. Marks if his view boils down to this; that at the very least, a situation such as the present, in which you have the right to use any music that you wish, in your view, is more likely to produce the right and the best music for a program than one in which you have to soncider such extraneous factor as cost. Is that right?

THE WITNESS: That's right, your Honor, and in addition to that, it will also affect the amount of music that you use.

THE COURT: That is a function of cost.

who has to please CBS on meeting his budget will be very concerned with what the cost element of the music is in that budget, and if someone is asked to set a price for his particular music in this withdrawal syndron that you posit, he is going to be competing against a set price list that has been established under this posted per-use system.

one of the things I have difficulty with is the idea that because someone may be able to withdraw a work from the price list, that therefore that puts the work into a free market. What it does is pit the work

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up against a work that could be substituted for it 3 that is in the price list. You don't have to have a free market at all. It is not like CBS dealing with the butcher, the baker and the candlestickmaker. The 6 are no price lists for butchers, bakers and candlestickmakers. But your per-use system posits such a price list. To the extent it does, I don't see where you are talking about a free, independent market:.

THE COURT: You asked for it.

MR. HRUSKA: I don't think I really did. I think that covered about five questions that I might: have asked and probably wouldn't have.

THE COURT: It is all opinion anyway.

MR. HRUSKA: It is all opinion. think in the interests of time I won't try taking it up sentence by sentence.

If we are going to go for another five or 10 minutes, your Honor, I have one brief subject I think I can cover easily within that time. I would rather not interrupt.

> THE COURTS Fine.

BY MR. HRUSKA:

Let me show you this, Mr. Marks.

I hand a copy up toyour Honer. MR. HRUSKA:

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This is PX36 for identification.

Q At the bottom of the first page there is a statement reading --

THE COURT: Shall we state for the record what this is? Is this an article written by Mr.

Marks?

really based on a speech that I made before the Billboard conference on the music industry, and this is a written version of the speech.

THE COURT: Written by you?

THE WITNESS: Written by Billboard but reviewed by me before it was printed.

THE COURT: All right, Mr. Hruska.

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There is a statement at the bottom of page 1
reading: "The society" -- maybe I ought to stop right
there.

By the society you mean ASCAP?

- A ASCAP, right.
- licensing of the performing rights to its members' music.

 It serves as a great convenience both for the user of music who is saved from the impossible task of seeking out each of the copyright owners to obtain a license and the writer and publisher, et cetera."

My question, Mr. Marks, is, do you believe that for a user of music the task of seeking out each of the copyright owners to obtain a license would be impossible?

Hruska. We went into this on my deposition, and you remember I said that I had in mind the thousands and thousands of small operators around the country who are using music, and the task it would be for them to contact the copyright owners and the task it would be for the copyright owners to police that use, and that was the context in which that was said. I don't think it applies to a user such as the CBS Television Network, where

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the user has a great deal more resources than a small hotel or bar or even a small radio station.

g How did you happen to leave out a largescale user like a television network from that statement?

A Well, as you can see from reading the article.

Mr. Hruska, the main thrust of this --

THE COURT: When was it putblished?

THE WITNESS: Pardon me, sir?

THE COURT: When was it published?

THE WITNESS: When? Let's see. This conference was probably in '68 or '69, your Honor.

THE COURT: Prior to the institution of this litigation, I take it, or would it be?

THE WITHESS: Yes, I am sure it was prior to the litigation.

THE COURT: Go ahead.

A The thrust of the article has to do with the ASCAP distribution system, and in fact the opening description of my situ ation at ASCAP is that I am distribution manager.

The other people on the platform included Thea Zavin of BMI, who had a similar function, that is, distribution, at BMI, so that the remarks on the first

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page going into the beginning of the second page are introductory. I was not talking about listing; I was talking about distribution in the main.

this speech were there any controversies between ASCAP on the one hand and the television networks on the other hand? You don't have to describe them, Mr. Marks.

Just, if you could, answer that quastion yes or no.

Well, it may have been around the time that we were making settlements with the networks on license fees. I don't recall that in connection with this at all.

surprising that — Mr. Marks, as important as his job is, and he was then discribution manager, doesn't own ASCAP — I would hardly find it surprising for him not to point out that CBS might be able to get in touch with copyright owners. He has freely admitted on the stand that he believed they would, so why do we have to go into his motives for leaving it out? I don't care why he did it.

MR. HRUERA: I do but I won't press it.

THE COURT: If you will explain to me if it
was a diabolical plot on his part to do it ---

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MR. HRUSKA: It is not a question of diabolical plot at all, your Honor. The case isn't this complex. The point, your Honor, is that for years — and this is only one example of it — statements have been made within the ASCAP organization by people sonnected violated within the ASCAP organization by people sonnected violated ascape mphasizing what up until the institution of this lawsuit had been a commonly accepted fact, and that is that no user, including television networks, could by pass ASCAP, that they would find it utterly impracticable. This is one example of that kind of statement.

I don't suppose that it is disputed that it exists.

I really don't think that, unless you can prove there
was a conscious policy of some kind, that it has any
probative value. Everybody likes to continue his
way of doing his business, and that does not seem to me
to prove very much about whether his motives are illegal.

MR. HRUSKA: No, no, I am not getting into this for illegal motives at all. I guess I have not made myself clear.

THE COURT: Then what would be the probative value?

MR. HRUSKA: The probative value is that this is one piece in a larger picture of a consistent

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repetition through the years by ASCAP that a bypass by a user of m ic, including television networks, would be an utcerly impracticable, irrational act.

THE COURT: I thought you were trying to prove something altogether different.

MR. HRUSKA: No.

much difference whether he left CBS Television out or not. He has admitted, if you are looking for an admission, if that is what you are trying to say, that it is impractical. I think that it speaks for itself to that extent.

MR. HRUSKA: All right, I now will turn to another subject, your Bonor, if your Honor would like to break.

THE COURT: I thought the gist of what you were trying to do was that Mr. Marks admitted that CBS could contact.

MR. HRUSKA: No.

THE COURT: Because that is equally import-

MR. HRUSKA: Under the per-use system with the per-use machinery, yes.

THE COURT: All right.

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THE WITNESS: Your Honor, I think I have mice to clear that in what I was saying at that point I did not contemplate — did not think in terms of whether CBS could or sould not contact.

THE COURT: That is why I asked whether the lawsuit had been brought by that time.

MR. HRUSKA: I now do get into an area that will take probably five or ten minutes.

THE COURT: Why don't we break for lunch an return at 2 o'clock.

MR. TOPKIS: May I inquire how much longer counsel expects to be with the witness?

MR. HRUSKA: It is difficult to estimate

but my guess would be about an hour.

we meet in the robing room or maybe a couple of minutes before, if I can get down here by then, to discuss what our calendar will be hereafter.

(Luncheon recess.)

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PAUL MARKS resumed.

questioning I will note for the record that the total will resume after today on Monday, September 17, and it is expected that we will proceed for three trial weeks of four days can and that by two weeks from tomorrow, which will be June 14, Mr. Hruska will address letters to defense counse accessed them of his offers of any documents which are no jointo evidence and any changes in designation as to deposition and any other material which should be noted for the record and counsel for the defendants will reply with su table speed thereafter, and the Court will rule on any difference.

All right, Mr. Hruska.

CROSS-EXAMINATION (continued)
BY MR. HRUSKA:

ASCAP now make tapes, audio and/or video tapes, or all chil programs?

Think we are presently make audic topes of all CTN programs. We may even be doing that on a sample basis, so that we get those programs that run five times a week during the week days, we may be taking those once a week. My recollection is hazy on that. I know we

changed that.

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With regard to the video tapes, we take a sample of CTN programming that we vidio tape one week a month,

a quarter, I think, and as new tapes of programs come on we make video tapes of those.

tapes? Just to make sure that when you recognize a song it is the song or something like that?

remember I said that we do check to verify the accuracy of the network logs on a sample basis.

THE COURT: Yes.

this is a visual use. In order to sustain the fact that it is a feature performance, we would have to check the use visually to make sure.

THE COURT: Right.

Q You mentioned yesterday that the sample of television station programs used by ASCAP was approximate.y 30,000 hours. You remember that?

A Yes. That was the local television sample, right.

Q You had indicated that part of that sample was actually listened to by ASCAP listeners and part of the

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sample was not listened to but came from oue sheets onecked with TV guides.

A That's correct. Let me see if I can planify that for you.

O Please do.

Joel Dean and through the use of TV guides we can tell what the programming is in any particular area. As an overlap on that, an overlay on those 30,000 hours that are picked out from the TV guides, we also have tape recordings of that time, so that we analyze not only the TV guide through the cue sheets but also tape recordings for sare of that time.

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3	Q The ASCAP listeners, the solfe; jis: do	
3	they listen to the entire part of that sample which is	
4	taped?	
5	A Yes. First of all, the solfeggia the	
6.4	listeners are not all solfeggis. You remember I	
7	said a solfeggi is one who can listen to the tape and	
8:	down the notation of music.	

THE COURT: He can write down what he hears, in other words.

THE WITNESS: Right, your Hone m.

A But the listenars do listen to the time that - they listen to all the tapes, that's right.

Q What portion of that 30,000-hour sample is on tape?

A I don't recall at this point what the taped portion is.

Q Do you have a rough approximation?

A I haven't looked at that in a leng ii a and I just don't remember.

Q What is the weekly salary of an SCAP listener?

MR. TOPKIS: We will stipulate that they

are either underpaid or overpaid, whichever in Hruska

wants.

THE COURT: What is the significance?

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MR. HRUSKA: There was a Wall Street.

Journal article which indicated that the salary has
\$150 a week.

THE COURT: Again, what is the significance one way or the other?

MR. MRUSKA: Mr. Marks suggested in his direct examination that ASCAP would have to add Listeners to its staff in order to listen to a greater proportion of CTN programs if CTN were to go on a per-use besie.

To get an idea of the cost involved ---

THE COURT: All right. Do you know the range of salaries for that work, Mr. Marks?

provide the salary figure for the whole department;
your Honor. The range, you know, may start, for a
beginniner, at 115. He moves up very quickly, depending upon what his skills are. There are homuse: for a
extra speed and accuracy, maybe upwards of \$200, 300.
Then there is overtime. There is a good deal of overtime
in this department. So that it may be even above
\$300 for an average -- not an average, but a part sular
listener. We would get the average by taking all of
them and averaging the salary cost.

THE COURT: It goes up to \$300 and higher,

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is that the idea?

THE WITNESS: Yes, it may very well, with overtime, your Honor.

THE COURTS I take it it is full-time

THE WITNESS: This is full-time work, yes.,
THE COURT: I think that gives me the feel

MR. HRUSKA: Yes. I wonder if I could spend one more moment on it in terms of the basic weekly salary rate.

THE COURT: All right.

MR. HRUSKA: What the range is there.

BY MR. HRUSKA:

Is it between one and two hundred dollars?

A No, it is above \$200. But you are running through all sorts of areas of proficiency, from the newest people to the most experiences and the fastest.

As I say, there is base salary, there are increments, there is a bonus for — paid monthly for additional work that is done, accuracy, there is overtime.

We can certainly take the total salary cost, divide it by the number of people and give you the average cost or the total cost. But I don't have it in my head.

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MR. HRUSKA: Perhaps we ought to do that,
your Bonor. I would like to get a figure. It
doesn't have to be absolutely precise, but a figure for
the basic weekly salary of people in this department.

THE COURT: All right. If PEOP intends to argue that point I think it is reasonable then supply the information in connection with it.

MR.TOPKIS: I will endeavor to you:

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Q Does ASCAP license doctors and dentists who use music in their reception rooms?

A I don't -- you mean do any doctors or dentists
hold licenses from ASCAP for music in their reception rooms? There are Musak licenses which cover
doctors and dentists' offices.

Q No, I don't mean that. I am malking about direct licenses between ASCAP and doctors and dentists.

A I don't know of any particular coctors or dentists who hold such licenses.

Q If ASCAP made a practice of -

A But I may not --

Q I am sorry.

A I may not know the answer, Mr. Hruska.

Q I guess maybe that anticipates my next
question but let me ask it anyway. If ASCAP made a
practice of licensing doctors and dentists would that
practice be one that would likely come to your attention?

A Oh, it might or it might not, but I don's -I don't know of any licenses with doctors and dentists
but there might be, and as I say, there are Muzak
licenses which cover doctors and dentists' offices.

MR. TOPKIS: REguse me. Your Honor,

I don't think there is any great need to waste time on

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this. If we have a handful of doctors and dentists' licenses it's a lot. We have, I am told, dicenses with a few clinics, and if more information than that is needed, I can't understand why.

MR. HRUSKA: No, I will accept that.

That is perfectly all right.

THE COURT: All right.

EY MR. HRUSKA:

offorts to check or police local establishments in the general licensee category to determine whether or not such establishments were making public performances for profit of ASCAP music. Are the people who do that regular ASCAP employees or do they work on a party time basis? Perhaps you can describe the relationships?

A Yes, we are talking about both types of people; as a matter of fact.

Q I see.

A As I said, we have 14 branch offices, about 150 people in the branch offices. These are full-time employees. There are people who work directly in licensing of these establishments and they go around and visit the establishments, see what the music use is and make the license available, explain to the owner

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of the establishment what the license is and show him what it is and what the rate is.

as to a license and there is a continued us: of their, then -- well, I getting to the second part of the the part-time people.

Q I am sorry. Go ahead.

of contacts they are unable to reach an agreement,
then there will be these people I mentioned yeatherday,
who are perhaps connected with the local music school or
in some way have a musical knowledge or experiouse, who
will visit the establishment and listen to see in they
hear ASCAP music, and make cartain notes and meso anda
on the use of the music. These are part-time puople
who are not employees of ASCAP.

Q Do you know the total number of people in that category that ASCAP has retained for those poses within say the last five years?

A Oh, I am sorry. I don't know. It each location they are retained as needed. Yes ends, I said there were some 300 lawsuits brought. I was corrected. There were some 400 lawsuits brought last year, so that — and these are all over the country

BLAK.

and there would be people who - this type of person who would be needed for that kind of evidence in them?

Q Are there certain types of establishment that these people are told to look at?

A Yes, they are establishments that are using music and that -- ASCAP music and that haven't role to an agreement as to a license.

are using ASCAP music, in order to find out if they are using ASCAP music somebody had to go there said find that out.

THE COURT: You mean hotel specialists and MR. HRUSKA: Not specialists so muc, your
Honor, as I just want to get an idea of the Types of
establishments that the ASCAP people in the lield who do
this work are told to look at.

tels, bars, grilles, taverns, nightclubs, skiting rinks, dance halls. I may have left out some. I don't recall.

Q Well, for example, suppose there were a small restaurant in a town with 10 tables. Would this be --

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MR. HRUSKA: A restaurant that had 10 tables. Let me start over again.

Q A small restaurant with 10 tables in a cown.
Would this be the kind of establishment that your
people would take a look at?

music they would come upon the establishment. You know certainly there are — now let's consider advertising their use of music. You don't have to visit the establishment to know that music is used. You know that it's used and then you visit to see what the type of music is.

- Q But you don't limit yourself?
- to those that are merely advertised. They are constantly on the lookout for establishments that are using music.
- or not the top 20 publisher groups in ASCAP could elect directors to fill vacancies as publisher representatives. I believe you told me you did not know. By any chance have you learned overnight whether the top 20 publisher groups in ASCAP could do that?

A No. I haven't looked at any material since

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might not be able to. I didn't know. I wasn't denying that they could.

MR. HRUSKA: I would like here, your Honor to press a request with respect to the last alection held within ASCAP for publisher seats, the number of total — the total number fof votes for each of those seats, and the number of votes cast by each of the top 20 publisher groups.

whether they could or could not have elected a member?

MR. ERUSKA: Yes, your Honor, and how far down the list of the top 20 you would have to go to get to that.

THE COURT: All right.

MR. HRUSKA: I have no further ---

MR. TOPKIS: If your Honor has the slighteen interest in it we will be glad to look.

THE COURT: I have that much interest.

MR. TOPKIS: I will make it as open-ended

MR. HRUSKA: I have no further questions

of Mr. Marks. Thank you Mr. Marks.

as I possibly could.

MR. TOPKIS: We have no redirect, your Bonor.

Marks.

THE COURT: All right. Thank you, Mr.

THE WITNESS: Thank you, your Fonor.

(Witness excused.)

I don't want to frustrate anybody who has been sinting here waiting to testify, and if you believe we will be able to complete this witness' testimony within the next hour and half or so, I think that is fine. But if it is going to be a situation in which you get half way through and then resume on the 17th of September, I think that would be rather foolish. What are your feelings?

MR. BLUMSTEIN: Your Honor, I think I can finish direct in an hour and a half.

THE COURT: Direct?

MR. BLUMSTEIN: Yes.

you want to do. Do you want to leave it hanging like that? Because I will have to leave here a set 4:15.

WA. HRUSKA: Let me say right now, if direct were to go to 4 o'clock I would say there would be no possibility whatever of finishing cross examination by

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I assume that. That is why THE COURT? I am asking whether it would be desirable to co that.

MR. HRUSKA: I would strongly profe to your Honor, that we -

THE COURT: May I ask who you are, sir? MR. SHULMAN: My name is Alan Shali ... I am a music publisher.

> THE COURT: You live here in lew Took? MR. SHULMAN: Yes, I do.

THE COURT: Are you going to re here in September, as far as you know?

MR. SHULMAN: Quite honestly, that is usually when I go on a European trip, in early September, around the 17th of September, as a matter of fact.

THE COURT: How did you know that I was going to ask you.

MR. SHULMAN: That is exactly when. As a matter of fact, I believe that is right after the holidays and that is usually when I go.

TER COURT: Perhaps we could, in Mr. Shulman's case, hear his testimony one day in September before the 17th. I really thing it would be frustrating to get his direct testimony and stop there and wait two

and a half months or whatever it is.

MR. TOPKIS: My only concern, your Honor, is that Mr. Shulman has been waiting for two days to testify. Could we consult his convenience? Which ever he'd be happy with I'd be happy with.

MR. SHULMAN: I would much profes, if I could, to get it over with today, but I can't be sure how long it is going to take on direct, and I certainly don't

know how long it is going to take on cross.

Which would you prefer, Mr. Shulman?

MR. HRUSKA: I would obviously have a preference not to end this session with direct. I would like to have an opportunity to cross examine Mr. Shulman right after he finishes his direct.

to say anything to the contrary but I don't suppose it's a matter of life and death. It just seems to be to be much more sensible for the examination to take place as a unit. I would be very glad to try and find with Mr. Shulman right now some day early in September when we could hear his testimony and that is all we do.

MR. SHULMAN: We could do that.

MR. TOPKIS: All right, fine.

Would your Honor like to use the rest of the

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time today? We have a deposition.

THE COURT: I would like to use it for something we can complete today.

MR. TOPKIS: We can read the Stanton deposition today, your Honor, and we can complete that.

THE COURT: Fine. I would like to hear it.

venient and I will have to call my chambers and see if that is convenient. They took my engagement book upstairs.

MR. TOPKIS: Any time the week of the 10th, Mr. Shulman tells me, would be fine with him, and it is with us.

Is that all right with you?

the first day or two because of the judicial conference and just coming back from summer vacation.

THE COURT: Wedar day of that week?

MR. TOPKIS: Fine.

THE COURT: When is that?

MR. TOPKIS: The 12t.

THE COURT: Gentlemen, I can*t make it on the 12th but I can make it on the 13th or 14th.

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MR. TOPKIS: The 31th would be fine, your
THE COURT: All right.

Is this a fairly long deposition?

MR. TOPKIS: It probably will take most of the time we have left.

THE COURT: Then I find it easier to grasp it if we have somebody take his place reading the answers.

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MR. TOPKIS: Mr. Belnick will be coing it.

Your Honor, we would like to begin with

Page 3 of the Stanton deposition. I was examining the

witness. This was taken on two days, the 19th day of

December and the 27th day of December 1972. And it began

(Reading)

- "Q What is your name and address?
- "A Frank Staton, 15 East: 96th Street, Harhattan.
- "Q Mr.Stanton, you are customarily iddressed by the honorific "doctor." What is the explanation of other than embracing courtesy?

Stanton in the city and there has been a great deal of confusion. Some years ago I decided I would go back to the professional dector and hope to distinguish myself from the other gentleman.

- Who. In what field do you have the doctorage?
 - "A Psychology.
- Just in the hope that I may be lucky could you tell me the subject of your doctoral thesis?
- The subject area was the measurement of audience it will have to supply the title for you later because it is

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a vary long one.

"Q Radio audiences, sir?

"A At that time, yes."

And then down to the bottom of the page at

for us your professional biography from the Are you left onto State in what I gather was 19352

of a young newly formed research department. In the late thirtier, I was made director of research, and I was to trace the period during the war years become a it was very complex period. I have spent three or foundarys a week in Washington every week and the resmon that time at the office. After the war I became a wice-president and general executive. I later became general musages of the company, and at the January meeting of the beamd in 1946, I was elected president.

"Q And you have held that title eval some?

"A Until October 1971, when I was made note that and continued as chief operating officer which prot I rold today."

Now going to Page 8, at Line 8:

You remember there was a time when PMI was

mbb-3 "Stanton formed and I think the date has been established as being 1939. Do you remember that? "A Yes. "Q You were aware that BMI was being formed at the time? I was aware of the fact that it had been formed I don't recall having any prior knowledge of its formation. "Q And there came a time when CBS decided to stop broadcasting ASCAP music for a period in the early forties. Do you remember that? "A I do. 0

Did you have any role in that decision?

MA I did not."

Page 11, please, Line 23.

"Q And when you became president in January of 1946, what were your duties?

*A I was the chief operating officer and as such all departments and divisions of the company reported to me and I to the chairman.

> The chairman was also the chief executive office:? " O

"A He was.

0 And for that matter is?

"A Yes.

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"Q And have your duties changed at any time since January of 1946?

Mr. Paley and I divided up from the practical point of view the operation of the company. His interests were primarily or foremost in the programming side. He obviously, as chief executive officer, was concerned with the total operation of the company, but if you had to describe the division of labor, I would say that he gave more time to programming and I gave more time to the other aspects of the operation.

"Q Would you tick off for me quite rapidly if you could, the other aspects that you refer to?

"A It depends on when you want to take the snapshot of my career, because in the early days we are talking about a total, virtually a total broadcast operation; and today, of course, you are talking about a company that is much more complex and has many other aspects.

"Q Confining ourselves to the broadcasting operation did you and Mr. Paley divide responsibilities in that area?

"A Well, just as he was giving most of his attention to matters in programming and I giving most of my attention to the other parts of the company, I sat in on many of the programming discussions, just as he participated in a less active role on the business side of the company.

"Q So in broad terms the dividing 1..ne would be that business was your concern and programming his?

"A Yes, except that is a litt le too harsh because
I was involved in programming and he was certainly involved
as chief executive officer in business matters.

*Q Fine. Your title, as I understand it, has been and is chief operating officer and Mr. Paley is chief executive officer. I have always been puzzled in many companies, as well as CBS, with the distinction. Does it mean anything to you or is it just another title?

"A I believe the records will show that until the very recent past we have not used those titles within the family, or outside for that matter. Mr. Paley never made a point of the fact that he was chief executive officer and I certainly never went around and said, 'Look, I am chief operating officer.' We worked together, as the records will show, for lo, these many years, and there has been a comfortable division of responsibilities. The organization chart shows everything practically flowing up through the president, chief operating officer, into the chairman's area, but the day-to-day operations don't always follow the organization line and the boxes on the chart.

*Q Since 1946, into whose bailiwick has the general subject of music relations with ASCAP and BMI and related

subjects fallen, yours or Mr. Paley's?"
We will skip the colloquy.

These matters were handled by the business affairs department of the network on the one hand and a comparable position as regards the company-owned stations.

"Q And was the business affairs department in the allocation of responsibilities that you described earlier between yourself and Mr. Paley in your bailivick or his?

Because the program department spent more of its time with him than with me, I would have to say that the business affairs part obviously was tied to the program department, and was more on his side than mire, but matters having to do with music licenses I think came more to my side of the desk than his."

Going now to Page 20, at Line 8:

- "Q The network passes on to affiliates one-half of the cost of an ASCAP license, does it not?
 - "A The cost?
 - "Q In both radio and television.
- "A It does in television. I am not prepared to say what the present plan of operation is in radio."

Going now to Page 24, Line 13:

MR. HRUSKA: Your Honor, I am afraid I was

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answer that Dr. Stanton gave regarding a splitting of cost of an ASCAP license, I think that really that question called for a legal conclusion and I don't think his testimony on this is really relevant and I would object to it on that ground.

There is an affiliation agreement. It is in evidence as part of the stipulation of facts, your Monor, Exhibit 2.

It describes the total --

THE COURT: Is the affiliation agreement stands in the networks with the stations?

MR. HRUSKA: Yes, yes.

THE COURT: Does it specify the amount paid by

MR. HRUSKA: In effect, it does, yes. It is part of a total complex relationship. There is one paragraph that does describe the split between the stations and the network on the ASCAP licenses.

THE COURT: Is this the formula method or by dollars?

MR. HRUSKA: Yes, formula methoc.

THE COURT: I will accept this now. I mean

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obviously if it is inconsistent the agreement prevails but if the agreement is unclear I think even if it asks for a conclusion it is not unreasonable to ask Dr. Standon for hiconclusion.

MR. HRUSKA: My point is I think if you read the formula alone as the only part of the agreement you was I reach the same conclusion.

MR. HRUSKA: I think if you read the agreement in totality you might reach a different conclusion. That is all I am pointing up.

THE COURT: I am not quite sure how you can get the same conclusion and a different conclusion.

MR. HRUSKA: Simply because it as one part of a larger economic financial relationship.

I don't consider Dr.Stanton's statement as bring an admissi against CBS which can overcome whatever I determine to be the legal effect of the agreement.

MR. TOPKIS: Going now to Page 24 please, at Line 12 or 13:

There came a time in December of 1959 when you had a talk with Mr. Paley about relations with ASCAP and BMI, is that right?

mbb--9 "Stanton I did not discuss relations in the sense of working relations. I had a discussion with ir. Peley in which I told him of the plan to ask for a per-use contra a in distinction to the contract that was then in force." Going to Page 29, at Line 12: Had any survey been prepared for you of the possible consequences of obtaining an ASCAP per-use licerate Can you help me when you say "a murvey"? *Q Dic anyone report to you in writing or crally

as to what might happen if you were able to et an ASCAP per-use license?

I had no written reports on that subject. I had conversations on that subject.

> "Q With whom?

"A With our general counsel, Robert Evans.

00 With anyone other than Mr. Evans

"A No, sir."

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(Mr. Topkis reading)

Going over to Page 30 at: Line 17.

"Q Would it be an accurate summary to say that the idea then of seeking a per-use lacense from ASCAP and BMI came to you from Mr. Byans?

"A Yes.

"Q Do you know where he got it?

"A I do not."

Going to Page 32 at Line 11, please.

"Q When did you first hear the term per-use license

"A I am unable to fix the time for that.

"Q Can you estimate it, approximately?"

MR. HRUSKA: Excuse me. I object to the form of the question. Do you mean the term or some words emboding the concept?

MR. TOPKIS: I will settle for either.

"A Mid sixties.

*Q From whom did you hesar the term of some words embodying that concept?

"A I don't recall.

"Q Have you ever discussed it with anyone other than Mr. Evans and your present counsel?

"A Yes.

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With whom, sir? **"**O

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Mr. Wood." 1

Going to Page 34, please, at Lin: 4.

With the head of the television 'stark divis':

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You had some conversations with it. Wood? "0

"A Yes.

In which the subject of per-use license came . : *Q Taking all or any part of them, wil you tel me the substille of your consersations relating to that subject?

"A The substance of the conversations related to the merits of a per-use contract as against blanket con tract where we were paying for music that we didn't use a ! where the fee had no relationship to music u e.

"Q Were these conversations before rafter you filed the current lawsuit, and I can remember your recoller or if it needs refreshment, by telling you that the action was filed on December 31, 1969.

I believed I testified earlier that those con versations took place in December. So they could have had have been before December 31.

"Q Fine. Can you give us any more details of the conversations?

> No. To the best of my recollection, I can't. "A

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"Stanton

	"Q	You say	that they	discussed	the	per-use	licer
and	blanket	license	. Was any	preference	e for	either	form
ахр	ressed i	n the co	nversation	s by either	of	1.651	

"A Yes.

"Q Could you, for example, tell us that?

"A I thought I had embraced that when I said we discussed the merits of the per-use contract as against too blanket contract.

"Q For all I know, Dr.Stanton, you decided the olincontract was extremely desirable.

"A Our subsequent behavior I think halles that fact.

*Q Along with other people, you can always shange your mind.

"A And we have from time to time.

"Q I get that impression. So you concluded in this conversation or these conversations with Mr. Wood that you would prefer a per-use license arrangement?"

"A Yes.

"Q Did you discuss with him the possibility of obtaining it by the filing of the lawsuit?

"A I did not.

"Q With whom did you discuss the filing of the law.

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suit, if anyone?

- "A With our general counsel, Mr. Evans.
- "Q And only with Mr. Evans?
- "A Yes.
- *Q So far then as CBS Television is concerned you are the only liaison opposed to Legal personnel who participated in the decision to file the lawsuit?
 - "A Would you read that back, please."

 MR. TOPKIS: It was, and the answer came.
- "A I had discussion with no one beyond Mr. Evans.
 There may have been discussions with others, but I didn't
 participate in them.
- *Q Were you the person who made the decision to tile the lawsuit?
 - "A Yes."

 Going now, please, to 39, Line 7.
- "Q Dr. stanton, I understand from a document I
 will now show you that the request for a per-use license
 was delivered to ASCAP and EMI on the afternoon of December
 19, 1969. Does that conform with your recollection?
- "A I don't know that it was delivered on the afternoon of December 19. This letter is dated December 19, but I cannot tell you when it was delivered.
 - "Q All right. You knew, however, that such a

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Latter was being sent?

FA Yes.

*Q And what was the next thing that you learned after it was sent?

"A Subsequent to December 19, I learned that we did not get an affirmative answer from ASCAP regarding this request.

"Q Did you see the answer that you of them ASCAL?

"A At that time I did not. I was told of the substance of the response."

Now going, please, to Page 41, at Line 11, where I said:

"Q Go ahead, if you will, Doctor.

Took place after I was told about the ASCAP response. Indeed, I cannot fix the date as to when that conversation took place. I did make inquiry of either Mr. Appel or Mr. Evans or perhaps both as to what the next step would be in trying to remedy or get a satisfactory answer to our request for a per-use license.

- "2 You inquired of them?
- "A That's correct.
- "Q And what did they say?"

There was an objection and a direction not.

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to answer, and I inquired.

*Q At some point or other you decided to file this suit, is that right? I mean you, Dr. Stanton, decided to file this suit.

"A I think I testified earlier that I did.

"Q Right. I asked the question by way of preliminary.

Do I understand that the only person you discussed filing the suit with was either Mr. Evans or Mr. Appel?

"A That is correct.

"Q You did not discuss it with Mr. Wood?

"A I did not.

of ASCAP and BMI that they give you per-use licenses did you discuss with him the question of what you would do if they didn't?

"A I did not.

"Q You mean that the substance of the conversation was, in effect, let's see if ASCAP and BMI will give us per-use licenses, and youdidn't go on to consider what you would do if they wouldn't?"

The answer is at the top of Page 43:

"A I did not.

"Q You knew at this time that your license with

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ASCAP was expiring December 32, 1969, didn't you?

"A I did.

do about that fact if ASCAP did not offer you a per-use

MR. HRUSKA: I hate to do this, four Honor, by it seems to me, just from trying to skim through this -I haven't had a chance to look at this deposition since it was taken -- there is a great deal of testimony in here to every little twitch of Dr. Stanton's thought processes in December 1969. I don't think any of this is of the slightest relevance.

We had a great deal of testimony from Mr.

Sipes, how Mr. Sipes in the business department at CBS Tele
vision Network worked out, his coming into the network,
finding out about the problem, worked out when he thought
was the solution, and the fact that it went above Mr. Sipes
to be reviewed by Mr. Wood and then by Mr. Stanton, and
there is testimony about Dr. Stanton talking it over with
Mr. Paley, but I don't think that any of this ratiocination
that occurred in late 1969 is really pertinent to the assect

THE COURT: Mr. Topkis spent a lot of time or it. I assume he has some reason for doing so.

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Will you tell me now what you think Dr. Stanton's thinking proves?

MR. TOPKIS: Certainly, your Honor. I think

Dr. Stanton's testimony taken in conjunction with the other

CBS esecutives adds up to the conclusion than hoboly at

CBS spent more than five minutes thinking about the per-u s

system.

THE COURT: And if so?

MR. TOPKIS: And if so, the consequence sould follow, it would seem to me, that that would bear on the question of whether that system is a more reasonable alternative.

Suppose they woke up today fresh and said that they wanted a per-use license and were able to give good justification for it even if they hadn't thought about it before. Why does the length of time over which they thought of it prove whether it is reasonable?

MR. TOPKIS: I don't think it does prove whether it is reasonable. I think it is a fact to be taken into consideration.

THE COURT: I think it may be a fact to be taken into consideration.

I am only saying to you, so you can understant

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candidly what my reaction is, that it seems to me definit ...

I do believe that the feasibility, the proof
of feasibility, is affected by, among other chings, a descristration and perhaps a degree of planning, and so I will
hear it, but there is a very, very limited impact by this
sout of thing.

When I come down to deciding whether I think is feasible or not, it is only fair to say that I don't think I am going to be terribly influenced by how such thought Dr. Stanton gave it. But I would be willing to histen to what you brought out.

MR. TOPKIS: I wouldn't expect your Honor to

be affected by that or by the whole totality in this

particular area, but I suggest its significance by indicating

to you that if there were evidence that CBs had studied

this for endless months and had inquirates and investigations made, you would regard that as probative.

influence. If that is what you are trying to prove I think it is relevant, yes, simply to show that they did not do a lot of work planning for this prior to bringing this suit

MR. TOPKIS: Right.

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that, your Honor. I think if the facts were, and they certainly are not, but if they were that suddenly the top executives of CBS woke up one fine norming on Jecomber 19, 1969, and the idea came to them and they said this is the way to go and sent a letter off to ASCAP, all of that would be totally irrelevant, if the idea itself is a good one and --

point because I argued that, and agree with you. I argued it earlier.

Nov, I understand Mr. Topkis is not trying to show that you need to have planned, but to prevent you from arguing that you did plan.

He shakes his head in agreement.

MR. TOPKIS: I was at Page 43, Line 8.

Didn't you consider with Mr. Wood what you would do about that fact, that is to say, the fact that the license with ASCAP was expiring December 31, 1969, if ASCAP did not offer you a per-use license? "

MR. HRUSKA: I object to the form of the question. Could it be couched in terms of whether or not there was a discussion that occurred between Dr. Stanton

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and Mr. Wood? It is a little vague as to whether you are asking Dr. Stanton whether he decided this subject in his own mind, which question he already answered, or whether this was an expressed part of the discussion which took place.

MR. TOPKIS: It is the latter.

- "A I did not.
- "Q Had you considered in your own mind what you would do?"

MR. HRUSKA: I object to the question It has been asked and answered twice now.

MR. TOPKIS: I take it the answer is no.

- "A What time are you talking about?
- Wood was had and the letter was sent at or about December 19, 1969.
 - "A The answer is no.
- "Q And you only considered, yourself what to do after ASCAP's response was received, is that right?
 - "A As far as I am concerned, that's correct.
- "Q When ASCAP's response came in or between the time that ASCAP's response came in and the filing of the sui!, did you discuss the subject with anyone other -- and by 'the

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subject' I mean your relations with ASCAP -- did you discuss the subject with anyone other than your countel?

"A I did not."

Going now to Page 47, please, at Line 20:

"Q Having this response, and that is the response from ASCAP, what made you decide to file the lawsuit?

"A Because we did not believe it was desponsive to our request for a per-use license.

that would have deterred you from filing the suit, is that correct?

"A That's correct.

"Q Yet before you received the response you hadn't considered whether or not to file the lawsuit?

"A I believe I answered that question before in the negative.

Yes. I was just giving you an opportunity to think it through again.

"A I realize that.

"Q You appreciated, did you not, Dr. Stanton, these
the offering of a per-use license would be a significant departure from prior practice for ASCAP and Bil. did
you not?

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Did you believe that an organization like "Q

Yes, I did.

ASCAP could make such a significant departure without the approval of its board of directors?

"A I had no knowledge of the internal workings of ASCAP or BMI.

"Q You think of them as significant business entities, do you not?

> "A Yes."

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May we go, please, to page 56 at line 24:

"Q You are aware, Doctor, that on various occasions CBS has involved the procedures of the amended final judgment to fix rates for ASCAP licenses of various kinds?

"A I am.

*Q Was the possibility of using that procedure to obtain the objectives that you sought by a per-use license ever contemplated?

"A I don't believe that that course of action would produce the per-use objective that we were seeking.

"Q Your basic objection was to have the fees that you paid bear a relation to the quantity of music that you used, right, in broadest terms?

"A Yes.

"Q Did you ever contemplate the possibility of instituting a rate-fixing proceeding and in that rate-fixing proceeding ask that the rate fixed be low or vary with the music used?

"Mr. Hruska: I object to the question.

I think we are getting down to a legal area. I don't think it is fair to ask Dr. Stanton questions about what the consent decree will permit, what it doesn't permit.

The decree itself, of course, is a matter of public

record. It provides the perfect program and it has reference to blanket licenses. We all know what they are. I just -- in effect, you are asking Dr. Stanton about the provisions of a 1950 ASCAP consent decree and I don't think it is fair to do so and I will direct him not to answer."

MR. HRUSKA: Excuse me one second. The question before the last question, I believe you read:

"Your basic objection "as to have the fees that you paid hear a relation to the quantity of music that you used, right, in the broadest terms?"

I think it clear from the context of this transcript, in which the prior question and answered used the word "objective," that this question was,

"Your basic objective was to have the fees. ."

MR. TOPKIS: I think you are right.

THE COURT: I actually assumed that with-

MR. TOPKIS: Right.

So now we are over on page 58 and I and Mr. Hrus 1 were saying:

provisions of a 1950 ASCAP consent decree and I don't think it is fair to do so and I will direct him not to

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"Mr. Topkis: I am not asiing him that I am asking him whether he ever considered at all. starting a rate-fixing proceeding in which CBS would demonstrate that its use of ASCAP music was low or in which it would seek a license in which the rate was geared to its use of ASCAP music.

"Mr. Hruska: I think Dr. Stanton has already testified that he did not believe that the procedures available under the 1950 decree would afford CBS an opportunity of having the fee measured precisely by the CBS use of music. I think that's the way to answer the question.

"Ar. Topkis: I don't think he said anything like that at any time, the way he answered it.

"O Having heard what your counsel just said, do you adopt it as your statement?

les. I thought what I gave in answer to an earlier question embraced the points he made, not as eloquantly, perhaps."

Then we go to page 64, line 4:

Did you ever, ever, at any time participate in a discussion with anyone about a per-program license? "A Y:38.

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	a O	How	many	times?

- I am unable to say, but certainly it wouldn't ---"A it wasn't a frequent discussion.
 - Can you approximate the number of occasions
 - I would approximate it at two or three. "A
- Do you remember when the first one was, "Q approximately?
 - "A No, I sannot.
 - Not even approximately? "Q
 - How approximate may I be? "A
 - By a decade. mQ
 - If you give me a decade, I will say the '60s. "A
 - "Q Not in the '50s.
- If you move the decade, maybe I would get "A into that --
 - We will have a rolling decade. *Q
- No. I am unable to be more precise on "A that answer.
- All right. So in the roughest of terms, we are talking about two or three discussions some time maybe from '55 on, something like that? Would that be reasonable?
 - I wouldn't quarrel with that. ·A
 - Do you remember the identity of anyone with WQ.

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*Q You understood that CBS had the right under the ASCAP amended final judgment to have a court set up a fair per-program fee as well as a fair blanket fee?

"Mr. Hruska: I object to the question.
The worl used by the decree is 'reasonable.'

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"Mr. Topkis: Again, I am so grateful

to you I can scarcely measure it."

ments. We finally got down to cases and I asked:

"Q With the needed modification, Doctor, will you answer the question?

*A I can't give you an affirmative answer to
that. My understanding of the 1950 decree had to do
with the blanket license. I never discussed the perprogram aspect of that.

Q Did you ever consider taking a per-program license for any part of CBS operation?

"A I suppose that if you take the discussion about per program that was held some time in that floating decade we talked about, that I would have to say yes.

*Q Did you decide to seek a per-program license for any part of CBS' operations?

"A I did not.

"Q You preferred to go along with the blanket license?"

Mr. Hruska objected to the form of the question.

"Q Tell me, if you will, why you did not seek

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cussions was D	octor?
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- "A I do not.
- "Q Can you approximate the date.
- "A No, I cannot.
- *60s CBS was restive under the blanket license as to its television operations, is that right?
 - "A That is correct.
- During that period of restiveness was any consideration given by you or by anyone at CBS, to your knowledge, to seeking a per-program license?
 - "A No."

Going to page 70, please, at line 3:

- *Q Do you know any of the operating personnel at BMI?
- "A If he is still chairman of the board, I know Sidney M. Kaye.
 - "Q And do you know Mr. Cramer, the president'
- "A J may have met him on occasion, but I have had no conversations with him about this subject.
- "Q You have known Mr. Kaye for upwards of 29 years, 30 years, probably?
 - "A Yes.
 - *Q Did you ever discuss blanket or per-program

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	licenses	with	him?

- "A I did not.
- "Q To your knowledge, did anyone at CBS discuss CBS' restiveness with anyone at BMI during the period of that restiveness?
 - "A I have no knowledge of any such discussion.
- "Q Did you ever suggest to anyone that if they wanted something other than a blanket license or a per program license they might ask RMI for it?
 - "A I did not.
- "Q Was it reported to you that BMI and refused to issue anything but a blanket or per program license?

"Mr. Hruska: When?

"Mr. Topkis: At any time.

"Mr. Hruska; Including in connection with this lawsuit?

"Mr. Topkis: Yes, sir.

- "A Yes, in connection with this lawsuit.
- "Q Other than in connection with this lawsuit?
- "A No.
- "Q Does CBS pass on to its affiliated stations a portion of the fees or the burden of the fees it pays BMI as well as ASCAP?

"A Yes.

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And your practice as to ASCAP and Bill has *0 always been parallel?

> "A Yes."

> > Going, please, to page 73 at line 20:

Doctor, as I understand the way television operates, and please correct me if I err, the Columbia Television Network sends out signals to affiliated stations and they broadcast them, is that right?

"A Without being technical about it, that is generally correct.

Thank you. Is it your understanding of the ASCAP blanket license offered to television networks that it authorizes the network and the affiliated stations which are broadcasting the signals - received from the network to publicly perform for profit the music of ASCAP members?

> "A Yes.

And is it your understanding, further, that the local stations need no additional license, that is to say, that CTN buys the license for them, is that right?

"Mr. Hruska: I object to the form of the question. When you say local stations need no additional license --

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"Mr. Topkis: For the broadcasting of the signals they receive from CTN. I am not talking about the material they originate themselves."

"Mr. Hruska: Your Honor, I press that objection right now. I think that does call for a legal conclusion.

It's kind of a tricky question. The question is does CBS buy the license for the local stations. Now, in reality, that calls for a conclusion of law. Let me put it this way: If it woosn't call for a conclusion of law it's totally irrelevant. If it does call for a conclusion of law obviously Dr. Stanton is not the person to render that conclusion.

THE COURT: I don't know whether Mr. Topkis brought this out because he was leading on to something else or whether he wanted to prove by Dr. Stanton what the license arrangements were. If he wants to prove it by Dr. Stanton it seems to me we are back to the same problem. The license agreements must control, unless they are ambiguous. If they are I will have to hear argument.

I suppose the lawyers could almost stipulate or agree as to what the effect of the agreements,

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THE COURT: Let me ask you this, ir. Do you dispute the fact if a CTN affiliate broadcasts a show coming from the network which includes ASCAP music, that by virtue of CTN's license the affiliate has the right to perform that music? Do you dispute that?

MR. HRUSKA: No, that is what the consent decree says. That is not the part of the question I am objecting to, your Honor.

THE COURT: Then what is it you are objecting to?

MR. HRUSKA: I am objecting to the part of the question that says -- let me read the whole thing -- "And it is your understanding, further, that the local stations need no additional license, that is to say" -- and here is where the objection starts --"that CTN buys the license for them; is that right?"

In effect that asks a complicated question of agency.

THE COURT: I will sustain the objection to that point if it bothers you. I don't think Mr. Topkis was out to try and prove that thing.

As I understand, Mr. Topkis, all you were trying to do, if it was anything beyond maintaining a

MR. HRUSKA: Right.

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THE COURT: All right. Whatever Dr.

Stanton says here, that is all I regard it as meaning, so let's go on.

MR. TOPKIS: "Mr. Topkis: For the wroad-

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casting of the signals they receive from CTN. T am not talking about the material they originate themselves.

"A So that your question deals with those programs just relating to the programs furnished by CBS
Television Network?

"Q Right, sir.

"A The answer is yes.

"Q My question is this: Referring back again to the free market in which you want to see songwriters and publishers compete, I am asking you whether you would be willing as a condition of attrining that market, to stop buying for the local stations the right to broadcast music on the programs they receive from the network and thus leave them with the individual responsibility for working out their individual deals with songwriters and publishers?"

THE COURT: I note your objection, Mr.

Hrusks, and I do no: assume that because the question
was put that way that means that CTN buys a license for
the stations, but I do believe it would be appropriate
to ask the question whether Dr. Stanton or CBS is willing
to leave to the stations their responsibility for making
individual deals, and I assume that the answer is
basically that.

MR.TOPKIS: Then there is colloquy, your Honor, and then over at page 77, line 8, I put the question:

a condition of having ASCAP's members compete with each other to sell performance rights, would you be willing to have your affiliated stations and your network obligated to buy those performing rights individually?

"Mr. Hruska: And for the purposes of this question, Dr. Stanton, you must assume that CTN is quite possibly subjecting itself to infringement claims because I assume that you cannot possibly know the legal ramifications of that sort of situation.

A I am mable to answer that question."
We then went on --

MR. ARUSKA: I think probably to really understand that answer, your Monor would have to read all the collogy on page 75 and 76 and the top of 77.

I don't know that it is worth it.

MR. TOPKIS: I will be delighted to read it. I was trying to shorten matters.

THE COURT: Let me read it to myself and note for the record that I am reading it to myself.

All right.

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MR. TOPKIS: Allright, we will then go, if I may, your Honor, to page 80, line 9:

"Q Dr. Stanton, with your counsel's modification, would you answer the question, please; that is to say, would you accept as a condition of the accomplishment of this free market a world in which ASCAP were forbidden to license television networks either for the networks or for their local stations?

"Mr. Hruska: I object to the form of the question. If you limit the question to licensing of television network programs, an answer may be given.

"Mr. Topkis: That is what I mean.

"A Yes.

"Q So in your view, Dr. Stanton, CBS could get along as a television network without ASCAP?

"A Are you saying CBG on its own without eregard to what happens to the licensing of ABC and NBC?

"Q Let's take it both ways.

"A The reason I ask is because I answered the question in regard to ASCAP being enjoined from licensing television networks.

"Q Any network, right? Right, so I am assuming ASCAP would be licensing no network.

"A Assuming that ASCAP would license no network?

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competitors have ASCAP you need it, and as long as your

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competitors did not have it, you could get along without it; is that right?

"A We want ASCAP music and we want to pay a fair price for it, a price determined by a free, competitive market place. But I would not want to be in a position where ABC and NBC or any other nationwide commercial network had access to that music and we did not."

Then please go to page 85, line 14:

- "Q Now in this world, Doctor, that you envisage,
 where a per-use license will be available to CBS Television
 Network, it would be your expectation that performing
 rights would usually be obtained by the producers of
 television programs; isn't that right?
 - "A Yes. For the most part that would be true.
- "Q And CBS, for the most part, does not do its onw producing; isn't that right?
- "A That is certainly true in the entertainment area.
 - "Q And that is most of your programming?
- "A That is correct. I just wanted to make the distinction between news and public affairs, on the one hand, and entertainment on the other.
 - "Q Right.

"That is just the distinction I thought you

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were making. So that the beneficiaries of the free competition that you say you seek would predominantly be the producers of entertainment television programs, isn't that right, and CBS would be only a second-line or derivative beneficiary?

"A When we acquire or purchase or license to broadcast a series there are many parts that go to make up the budgets and music would be one of those components.

"We would have to budget the producer's use of the music. If we achieved this competitive market that I referred to, there would be some savings I would expect because by definition in a competitive free market place you do have or you should have some savings as against the monolithic or monopoly, if I may characterize it, the way it is handled with ASCAP representing all the writers and publishers today other than those represented by BMI.

"Q So you would expect to save money?

"A I thirk that the application of the ver-use concept and the free negotiation that we would have with writers and publishers should end up with some savings."

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Going now, please, to page 90 at line 9:

"Q You told me this morning that you had a rough idea of the payments that CBS Television Network was making to ASCAP in 1969.

"A I did.

"Q Do you remember approximately what that figure was?

"A Of the order of \$5 million.

"Q And half of that of course would be borne by your affiliates, passed on to your affiliates?

"A That is correct."

Going to page 100 --

MR. HRUSKA: I take it, your Honor, that is accepted with the same conditions as the other statement we discussed.

other evidence about amount, I should think that Dr.

Stanton would be a qualified witness to talk in terms of amount, but if an agreement says that 50 per cent or 30 per cent or 20 per cent or some formula is the correct thing, then the agreement controls.

MR. TOPKIS: Page 100. It is numbered 100-1 for some reason. This is at line N:

"Q Dr. Stanton, you said this worning that you

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decided against seeking a per-program license because

you regarded a per-program license as unwerkable. Will

you please tell me why?

"A At the time I gave consideration to the perprogram approach as distinguished from the blanket appriach, I was informed that the per-program cost would
be at a higher rate than the blanket approach. And it
makes no sense to pay more money for the same thing that
you can achieve another way, meaning the blanket approach.

"Q You surely were not told that the net dollars would necessarily be higher, were you?

"A " was led to believe that the rate per unit would be higher.

- "Q What do you mean by 'rate per unit'?
- "A Rate per-program.
- *O Rate per-program, the percentage of the revenues of the program would be higher?
 - "A Right.
- Than the percentage charged for a blanket license?
 - "A Correct.
- But that would not necessarily result in a higher net dollar outgo, would it?
 - "A We would have to satisfy ourselves on what the

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"Mr. Popkis: Oh, no. He did not tell me that latter part.

"Mr. Hruska: I thought that was stated.

If that is your recollection, good" --

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"A You can't live in a creative world with that kind of a fiat from management.

"Q You mean you think of it as indispensable that your creative producers be free to use any music they want without regard to economic considerations, is that right?

"A Under a per-use contract arrangement there might be prices set so high that I could not say categorically any music because there would be some trade-offs. I might want to take the money that would be spent for a very expensive number and say I will take a less expensive number and apply some of that money to other elements in the program.

"O Doctor, let us come back to my basic question, if I may, why is the program license arrangement un-workable.

"A For the reasons I already stated.

spect. You keep telling me if the races were very high you could not afford it. But that is all I heard.

And I respond to you by saying that there is a federal judge standing by to assure you that the rate will be reasonable.

There was some colloquy.

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"Q Why did you regard, or since you say that you, today, feel that a per-program license is unworkable for the same reasons that you did in the mid-to-late '60s, we will not fuss over the tense, why do you regard the per-program license as unworkable for Columbia Television Network? Where would your problems arise?

- "A In the area of economics.
- "Q Only?

"A I would have to say that the other reasons relate to economics but it would have an inhibiting effect, in my opinion, on a creative decision made about the program's schedule.

"Q Is that the problem, that the fact that a charge would be made for a program which contained ASCAP music would operate as a deterrent on the creative exercise of the producer? Is that the problem?

"A If the difference in rate between the two approaches to the solution were substantial --

- "Q That is per-program and blanket?
- "A Yes.
- "Q Yes?

"A Then that would feed back to the cost of taking one program as against another program.

*Q Of course it would. Put where is the

problem, the insoluble problem, or the difficult problem?

All you are telling me is if you have to pay for something,
you have to pay for it. No doubt about that.

*A And there is no feeling on our part that we should not pay for it.

"Q Okay.

"Then why was the problem that you envisaged with a per-program license?"

Mr. Hruska and I had some colloquy and I think we can skip it and go on to page 107, line 18, where I said:

"Q Could you suggest one to me, Doctor, that would make the per-program license unworkable?"

I didn't get an answar.

Let's go to page 108, line 13:

"Q When you decided against trying a per-program license or considering it seriously, were you aware that under the SASCAP amended final judgment not only were you entitled to have the Court fix a reasonable fee for the per-program license, but also a fee which would afford you a genuine sconomic choice between that license and a blanket license.

"A I was aware of the consent decree and the fact that we could go to the court on that matter. Our,

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or my deliberations or consideration, did not encompass that at that time.

"Q How about today?"

There was some colloquy again and I think I better read it because it clarifies the succeeding question."

"Mr. Hruska: I object to the form of the question.

"Mr. Topkis: Dr. Stanton had told me before that he finds a per-program license unworkable for
the same reasons today that he did back in the mid-to-late
'60s. He seemed to me just now, in formulating his
answer, to be focusing on that prior time and by my most
recent question I sought only to inquire whether he now
has in mind the provisions of the decree which I have
related to which I referred.

"Mr. Hruska: Whether he now has it in mind in connection with reaching a decision to a problem, a solution to a problem?

"Mr. Topkis: I take it that Dr. Stanton's earlier testimony to convey the idea that just as he thought a per-program license unworkable some years ago so he does today. I ask him whether in formulating that

mba "Stanton juigment, as of today, he has considered the provisions of the decree to which I have referred his attention. "The Witness: I have not." Now we go, please, to page 112, line 25: Dr. Stanton, you decided in the mid-to-late *O 1900 not to seek an ASCAP per-program license; isn't that right? . *A Yes. .0 Okay." THE COURT: What page? MR. TOPKIS: I beg your pardon, your Honor. Page 112. THE COURT: I see, all right. MR.TOPKIS: "Q Dr. Stanton, you decided in the mid-to-late 1960s not to seek an ASCAP per-program licease; isn't that right?" MR. HRUSKA: Your Honor, may I just interjact for one moment here? There is a real problem, I think, in dealing with a deposition of this length, of breaking up flows of testimony. There is a portion of this starting on the bottom of page 109 and page 110 which I think, and I am reading as I try to follow this,

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probably is necessary. On page 112 too. MR. TOPKIS: I will be delighted to read it

straight through.

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MR. HRUSKA: Yes.

MR. TOPKIS: No problem.

Let's go to the bottom of page 109, where I had broken off at line 23:

concepts, specifically the decree's provision that you may have the Court fix a reasonable fee for a per-program license if you are dissatisfied with any fee that ASCAP may propose and the provision that any fee proposed and fixed for a per-program license must offer you a genuine economic chairs between that license and a blanket license, will you tell me, please, having those terms and provisions in mind, why the per-program license is unworkable?

"A By our request of ASCAP, we were not seeking a per-program solution to the problem. And the per-program solution doesn't go to the heart of what we are seeking. We want to get a relationship between the use of ASCAP music and what we pay for it. And the per-program course of action doesn't deal with that issue."

There was some colloquy and we will go down to line 23:

*Q What the per-program license does or does not

deal with is at this moment irrelevant to my question.

And there was some colloquy, and I think at that time I may leave out that colloquy and we will

"My question is why is the per-program license

go to the testimony at the bottom of page 112, line 25.

THE COURT: Which we have already.

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Mk.TOPKIS: Right. We pick up perhaps at 113. line 7:

"Q I agree with you. I thought you told me
this morning that you thought of it, that is, the perprogram licerse, as unworkable, and I am still trying to
find out why you thought of it as unworkable in view of
the fact that the amended final judgment gave you an
absolute right to a reasonable fee and one which afforded
you a genuine economic choice between the program fee
and the blanket fee."

There was more colloquy. Let's go over to page 114, line 15:

"Coming back to my question, with all the fallibility that our judicial system necessarily embraces, there is a judge sitting down in Foley Square assigned to preside over the ASCAP amended final judgment.

"Having that fact in mind, would you please tell me why you regarded the per-program license as un-

"A I find it difficult to go beyond what I have already said. Unworkable for me embraces the cost involved in the solution and if it is adding to costs rather than giving us at least equal costs or what we seek in the

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And you were not asking for one?

per-'18e.

*Q

"A That is correct.

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So your choice was between blanket and per--0 Those were the two styles of licensing program. that you were contemplating, right?

That is not right.

What is right, sir? What styles were you *0 contemplating?

Contemplation, I think, embraces a number of things other than the options that are available to you at that time.

"O O'ay. I will accept the suggested rephras- . ing of my question. I get it from anywhere and welcome it from avywhere. Am I right that you regarded your real options as between blanket and per-program and decided against per-program because you thought it unworkable?

> "A Yos.

I put to you the fact or the facts that we have gone over so repeatedly about the genuine econonic cipics and the reasonable rate and so on, and I ask you, having those circumstances in mind, why was the perrogram license unworkable?"

There was some collogny, and on page 119, at line 5, the doctor responded:

The answers all relate to cost.

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"Q What answers are there other than 'I believe the per-program license would cost more'?

"Mr. Hruska: Than the blanket?

"Mr. Topkis: Yes.

- "Q Is there any answer other than that?
- "A That is the bottom line."

 Now we may 93 to page 123, line 8:
- of license would be more workable than the per-program.
- "A Yes. Within the context of our line of conversation at this point.
 - "Q Will you tell me why, please, sir?
- "A In the first place, the per-use arrangement would relate use -- would relate payments to the actual use and the per-program approach would not.
- *Q Why would not the per-program relate payments to actual use?
- *A Because in a per-program contract, if you had one number you would pay the same percentage regardless of what that percentage is as you would if you had ten or fifteen numbers.
- "Q Is that the only way in which the per-use license that you seek in this litigation is preferable

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to the per-program license that is and has been available to you?

> "A No.

Would you tell me any others? *0

Under the per-use approach I would contem-"A plate that we would have the opportunity of going into the market place as I dealing direct with writers and composers. and that is another difference between perprogram and per-use.

Anything else?

No. This is the first time I have ever really examined that thing, that question. Ome other things may have occurred to me but nothing else occurs to me no!!.

> Very well. Oa

*Referring to the desirability of being able to go into the market place and deal on a fa:2-toface basis with songwriters and publishers, that might produce a higher net cost or lower net cost for music, might it not, depending on your bargaining skills and the skills of those adverse to you?

"Mr. Hruska; I object to the form of the question. I don't know what you mean by skills. think it is very vague. The witness may answer it.

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"Mr. Topkis: I think Dr. Stanton might have a clue as to what I mean. But you say he may answer?

"Mr. Hrucka: Yes.

"You may answer.

"A Whom you referred to higher or lover net cost, were you talking about a single number or were you talking about a schedule in the round?

"Q I was talking about the latter.

free market place. I would not expect the total to be higher, I would expect it to be lower. But on individual numbers it might be higher than we pay today and it might be lower. It would depend upon the importance of the particular number to the creative producer, and it would, as on have indicated, hinge on negotiating skills.

"Q Why would youthink that as a totality it would be lower?

"A Because I think there would be competition between the suppliers of the music.

"Q And you think competition would produce reasonable fees which would tend to be lower than the fees payable under a blanket license?

"A I do.

repeatedly, that the fees you have paid under a blanket license to ASCAP are reasonable, are you not?

DA I am not.

"Q I think your counsel will so advise you.

amended final judgment provides for a judge setting reasonable fews, and I ask you why it is that you think the operation of negotiations on a face-to-face basis between CBS and songwriters and publishers, on the other side, lwould produce lower aggregate fees than the reasonable fees that a judge might set?

"A Are you addressing yourself no the per-use con-

"Q Yes, I am.

Judge on a case-by-case basis to get a rate set. I don't think we would get any programs on the air.

my ready acquiescence.

*No. I meant why would you expect that face-to-face negotiation for per-use licenses would produce lower aggregate costs to CBS than a blanket license under the surcryision of a court?

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- *A After twenty-five years or more in this business I have the firm belief that competition will yield a lower overall cost than dealing with a common sales agent for all the writers and publishers.
- provision of the amended final judgment that a court
 will set a reasonable fee?
- wall, this takes me back to something I said earlier, and that is that I have more confidence in the market place for setting rates than I do have in the court procedure, with all of the problems attendant thereto.
- "Q Are you aware how many times CBS, on behalf
 of its various interests, has invoked those court
 procedures, Doctor?
 - "A No, I am not.
- EQ Ler: me see if I can refresh your recollection.
- the rest of this, I don't think there is any possibility of our finishing Dr. Stanton's deposition today. I don't think there is any possibility of Mr. Topkis reading the portions that he has designated.

I think I would be willing at this stage, if

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we were to break now, to just have fed to the reporter the remaining portions of the deposition that ASCAP wants to designate or read in and the remaining portions that we want to read in and your Honor at your convenience can read the rest of it, or perhaps even read the entire deposition.

THE COURT: I heard an awful lot of it

I am not generally crasy about having to read a whole deposition, but we certainly have gotten a lot of it in, so
that I am aware of it already.

You feel it is important that you literally rend --

MR. TOPKIS: I do, indeed, your Honor. I think I have about eight excerpts left and I am confident I can finish before 4:15.

THE TOURT: All right, if you can. You are free, of course --

MR. HUSKA: To read in response?

able to do that, frankly. You could phone and make a date to do it some time. I can't do it this afternion after 4:15.

Mr. Torkis, I really thing that puts Mr.

Hruska at something of a disadvantage. I don't think you

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intended to, and I am not sure that it's all that great, because I am not sure just how much psychological influence reading out loud has over reading it to myself.

since ASCAP has read a very substantial portion of the deposition already, and I can't do anything about Mr. Hruska's request, except to Monor our termination at this time, I think "will do that.

If you are in the middle of a subject at this point, Mr. Topkis, I would be glad to let you finish reading whatever deals with this subject.

MR.TOPKIS: Your Honor, could I have about five minutes more? There are a few things that I would dearly love to call to your attention. That will, I think, leave my friend —

give you the five minutes, but to try and make this a fair procedure, although I think we are maximizing the difference of how we do it, I will allow you, Mr. Hruska, if you wish, to write me a letter with regard to whatever of Dr. Stanton's testimony you are putting in and specifying in a few paragraphs what you think is established by it or something like that.

After all, in the long run, either I am going to get what you are putting before me or I am not going

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to get what you are putting before me.

MR. ERUSKA: I understand that, your Honor.

May I be heard very briefly on an alternative suggestion?

THE COURT: Sure.

have the remaining reading of Dr. Stanton's deposition when we start in the fall, because I think this procedure in which we are going to have the portions selected by ASCAP read and then —

have the extra five minutes. Then we will do whatever more needs to be done on September 13th, assuming that we will not take the whole day with Mr. Shulman.

MR. "OPKIS: On page 132, line 12:

In the per-use licensing system which you seek to achieve by this litigation, would it be your expectation that the producers would normally come to CBS with the performance rights already obtained for the music involved?

"A No. It could take a variety of forms but I would contemplate that the producers would go direct to the suppliers.

*Q Wouldn't you insist that a producer come to you with the performance rights cleared?

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"A Yes. But I don't see how that reads on whether we would do it or the producer would do it."

I will skip through to Dr. Stanton's answer on page 134 at line 9:

"A Yes, I would expect the producer to get those rights.

"Q You would insist on it, as a matter of fact, wouldn't you?

"A I certainly would.

ase license from ASCAP, but an ASCAP member and ABC and MBC also had such licenses, but the ASCAP member had the right at any time to withdraw any composition from the ASCAP repertory, you would similarly insist that the producer bring you a program with the rights already cleared, would you not?

"A Yes."

MR. HRUSKA: I ask the next question and answer be read here for context, your Honor.

purposes, Dr. Stanton, would you not expect that in a world where there were individual negotiations with songwriters and publishers and there was also an ASCAP per-use license, the ASCAP per-use license would almost

never be used?

- Down at the bottom, line 21:
- "Q My question is, Doctor, where you expect to use this ASCAP per-use license?
 - "A What do you mean by where would I use it?
 - "O In what stuations?
 - "A If the number was in the ASCAP catalog?
 - "Q If what number was in the ASCAP catalog?
 - "A -- that the producer sought."

 Let's go to 137, at the top:
- vidual negotiation with songwriters and publishers, and CBS had a per-use license from ASCAP, in what situations would you expect that the per-use license would be used by CBS?
- across the loard for all networks, all television networks?
- having /SCAP per-use licenses, yes, and I suppose, for thit matter, BMI per-use licenses; yes.
- "A This probably is not the answer, but as I read your -- or listen to your question -- the answer would

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be in all program situations in which CBS was the producer. This is very limited today in terms of numbers, but --

"Q All right. Let us talk about what situa-

*There are your news programs and your public events programs; right?

"A Right.

*Q Are there any other programs in the entertainment field which C'3S today produces?

"A Yes.

O What are they, sir?

"A Gunsmoke:.

"Q Anything besides Gansmoke?

MA There may be some. No, not that we pro-

okay.

"So we are talking about your news and public wents productions?

"A And I am talking network now.

you would expect to use the ASCAP per-use license.

What kind of music use you make on your news program??

Let's be specific.

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*What are your news programs? I will come to public events in a second.

"A We start with the Evening News.

"O Is that the Croakite show?

"A That is the Crunkite broadcast. We have the 7:00 to 8:00 a.m. news, Hunday through Friday.

"We have a half hour of news, usually, on Saturday evening, a half hour on Sunday evening."

THE COURT: Excuse me. It seems to me this is really cumulative of v at I have already heard about the news programs, anyway.

MR. TOPKIS: I will stop then, your Honor.

THE COURT: All right.

MR. TOPKIS: I think we will wait until next time them, your Honor.

mnn. I ion't know that there is anything further to state at this time. I will reserve and I expect to see you on the 13th of September for Mr. Shulman's testimon, and thereafter for a completion of the record as to this part of the case, which may or may not be dispositive.

I wish you all a very good summer.

(Adjourned to September 13, 1973, at 10:00 a.m.

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2664	4	distribution	distributions
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2712	3	listing	licensing
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2721	19	experiencea	experienced
2724	15	party-time	part-time
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2735	15	wekk	week
2738	4	litt le	little
2743	13	approximately?"	approximately?
2743	14	MR. HRUSKA	"MR. HRUSKA

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2743	17	MR. TOPKIS	"MR. TOPKIS
2743	19	hesar	hear
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2749	16	Networ k	Network
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2752	21	license?	license?
2752	22	MR. HRUSKA	"MR. HRUSKA
2753	7, 13	MR. TOPKIS	"MR. TOPKIS
2753	11	MR. HURSKA	"MR. HRUSKA
2756	4	involved	invoked
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2760	5	qe	delete "qe"
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2769	3	acauired	acquired
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2779	2	MR. HRUSKA:	"Mr. Hruska:
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Columbia Broadcasting System

VS.

69 Civ. 5740

American Society of Composers Authors and Publishers, et al.

> New York, New York. November 26, 1973 10:00 A.M.

(Trial resumed.)

THE COURT: Good morning and welcome, gentlemen.

(Case called.)

MR. HRUSKA: Plaintiff ready.

MR. TOPKIS: ASCAP ready.

MS. KRARSE: BMI ready.

THE COURT: Very good. I am glad to see we are safely barricaded against all risks.

asked each of the counsel if they would be good enough to make an opening statement this morning so we could remind each other what had already been put into the record last May and sarlier. We will start that way.

I will call on Mr. Hruska first.

MR. HRUSKA: Your Honor, just as a logistical matter, how would you like the presentation to be made?

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THE COURT: Whatever makes you most comfortable.

If you want to come up here --

MR. HRUSKA: I will do it here.

THE COURT: Fine. Incidentally, in view of the smallness of this courtroom and I am afraid the one we are going in next week, you are perfectly free to use the jury how or any other facilities that can help out, get the job done.

MR. HRUSKA: I would like to use this time,
your Honor, to present an overview of the case, and the
best way I know how to do that is to adopt this analytical
approach. That is to assume first that ASCAP's rights
are exclusive and consider the antitrust significance of
that and then remove that assumption, factor, in the nonexclusivity provisions, and then determine whether that
legal right of non-exclusivity makes any practical or legal
difference. Considering first the exclusivity assumption,
and I won't spend too much time on this, this is a situation in which all writers and publishers, all writer and
publisher members of ASCAP would give ASCAP exclusive rights

This is the situation which existed prior to the 1950 Consent Decree.

I think there is absolutely no question that

a marketing device in which the sellers confer, exclusive sales rights, to a common sales instrumentality is a per se violation of the antitrust laws.

Prior to 1950, the Witmar and Roselle case, this was exactly the holding of the District Courts in those cases.

In Watson against Buck, a 1941 Supreme Court decision upholding the validity of a Florida statute, the Su Court said that ASCAP came squarely within that statute definition of "price fixing combinations composed of copyright owners."

The Court also said in that case -- and this is a case I don't think perhaps we have given enough attention to in this lawsuit so far -- the Court said, "Unless constitutionally valid Federal legislation has given to individual copyright owners the right to combine the State's power validity to prohibit the prescribed combinations cannot be held non-existent merely because such individuals can preserve their property rights better in combination than they can as individuals."

In the whole line of antitrust decisions by the Supreme Court from Addiston Pipe through Topco, it is perfectly obvious that this sort of exclusive common sales agency device would be illegal, per se.

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I don't really think there is any dispute about the proposition. I doubt even whether ASCAP will dispute.

Does that mean that a combination of sellers, the fact that they are violating the antitrust laws per se -- does that mean that they have no defense at all to an antitrust action?

what it means. There is some possible authority, and we have dealt with this before in the case here — it has never been fully articulated — but I suppose you might do so by saying that if the market in which this combination exists is the sort that inherently cannot function, in the absence of what would otherwise be a per se violation, then perhaps that combinative activity should be left alone.

of course, that is not involved in this case any more.

if CBS drops its ASCAP license altogether, it will function so well that CTN would not sustain any competitive disadvants

Market will function for television networks if they all were to do without ASCAP licenses or what amounts to the

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same thing, if ASCAP were enjoined from licensing television networks, or if ASCAP were forced to operate under the more carefully regulated structure of a producist.

I think what is absolutely crystal clear in the antitrust laws is that if the market will function under a more competitive system, then that more competitive system must be established.

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superior in commonic and social effects to a competitive system, gives financial security to its members, that it allows them to spread their income and support their widows and encourages them to create; that it is better from a public policy standpoint, all these arguments which have been raised in one form or another down through the annals of anti-trust jurisprudence have been rejected time and again by the Supreme Court as being totally beside the point.

As the Court said in the Northern Pacific Railroad case, the Sherman Act rests on the premise that the unrestrained interaction of competitive forces will yield the bast allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions, but even with that premise open to question, the policy unequivocally laid down by the Act is competition.

Now, I think we are ready to remove the assumption of exclusivity and consider whether the non-exclusivity provision of the consent degree makes lawful what would otherwise be plainly unlawful per se as under Section 1--

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maybe I didn't make it clear, is more a refreshing of our mutual recollection as to the facts which were of record, rather than the law, which I think we are reasonably well acquainted with, and I assume that sooner or later you are going to try to give us that.

MR. HRUSKA: I certainly shall work that into this. I think the case is so much a legal case, involves so many legal issues, that it is very difficult to discuss the facts without providing that legal framework.

an not trying to prevent anybody from telling me what they think is the legal significance of the facts in the record but we are all pretty well acquainted, I think, with the legal principles nere and I don't want to prevent you from presenting whatever you want in your own way. I do want you to understand that I am looking for.

MR. MRUSKA: All right.

Now, under the analytical approach in which we have now removed the assumption of exclusivity and focused on the situation as it exists today with a non-exclusivity provision in the consent decree, and I think the approach here is to determine whether or not that provision in the decree makes a factual or legal difference.

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Remember that the exclusivity arrangement was illegal per se because it foreclosed competition among the members and it derived buyers of access to the market, so the question becomes, does the non-exclusivity arrangement result in the same thing, does it bring us back to the same place?

As a matter of historical fact, obviously it has.

No television network has ever attempted to directly license its needs, no member of the combination has ever engaged in price competition with other members of the combination to fill requirements of television networks.

So the result is exactly the same as it has been, or as it had been under the exclusivity arrangement.

Moreover, ASCAP contends here and there's been a good deal of testimony by ASCAP witnesses, primarily in the depositions, and the documents reflect this, that if a television network were to directly license, writers and publishers would be, to use, I think, Mr. Finkelstein's words, at the mercy of the television networks.

In other words, ASCAP says the networks would pay a lot less. They would be able to drive that price down to almost nothing.

Now, we don't believe that it is true or even

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why I present it, albeit for different reasons, that the totality of direct licensing fees would be substantially less than present fees—the very fact that no television network has attempted a by-pass in the 23 years wince ASCAP's rights were made non-exclusive by the consent decree, in legal theory, at least.

That fact, itself, I think, gives rise to a strong inference that this is not a practicable alternative.

In other words, this non-exclusivity provision is more apparent than real. So it is a matter of historical fact that changed nothing.

Associated Press and other decisions teach us that if the only alternative that a buyer has to a cartel and the competitive practice would cause that buyer competitive disadvantage, then that alternative does not excuse the cartel or its practices.

On point of fact, the alternative in these circumstances is not real.

It is an approach to which no one will in fact resort.

Now, applying that legal test here, if any

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one television network must sustain a competitive disadvantage in order to by-pass ASCAP, the television network will not by-pass ASCAP.

The results are the same as they would be if

ASCAP held exclusive rights. Thus the legal conclusion p

must also be the same. ASCAP remains a price fixing

combination of copyright owners, using the Supreme Court's

language in Watson against Buck. That situation is un
relieved by this conclusory by-pass alternative.

In fact, the effect and thus the legal conclusion must also be the same if the risk of incurring competitive disadvantage in a by-pass is sufficiently high that no television network will ever try it.

Because if the cartel system has made the risk

if a by-pass that high so that no television network will

try it, they have accomplished the same objective as they

did under the exclusivity arrangement. There will be no

direct licensing and thus they will continue to enjoy the

benefits of selling their product without having to compete

in price and continue to thwart the purpose of the anti
trust laws in marketing.

Now, from what has been said at this trial and before it, we obviously believe that if this practice which is plainly anti-competitive in result is to be justified

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by the existence of an alternative, then it is ASCAP which has the burden of proving the practicability of that alternative.

That is, that the alternative is practicable in fact and sufficiently slow in prospect that the networks concerns about the high risk must be regarded as ill-founded. But I will not spend time on that burden of proof question because this case by no stretch of the imagination turns on a ruling as to which side has the burden of proof because even assuming, contrary to law, that CBS had the ultimate burden of proving that a by-pass would result in competitive disadvantage, the evidence on that point, including an explicit stipulation to precisely that effect overwhelmingly demonstrates that such competitive disadvantage would occur.

I would like to spend a few moments on that stipulation and make a point which I think is of the greatest possible significance to this case particularly at this stage of the case.

And perhaps for that purpose we might hand up a copy of the stipulation to the Court.

Specifically, here, your Honor, I am talking about the second sentence, second and third sentences of paragraph 13 and paragraph 15 of the stipulation.

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of paragraph 13 and the full paragraph 15?

MR. HRUSKA: Yes, your Honor.

THE COURT: I think it might be well for Miss
Kearse and Mr. Topkis and for the record for me to read
those sentences although I believe we all recall them.

The second and third sentences of paragraphs

13, I am not quite sure why the third sentence is in brackets
in this copy--

MR. HRUSKA: The third sentence is in brackets because it is not a substantive stipulation in the sense of setting forth substantive facts.

THE COURT: But it is part of the stipulation?

MR. HRUSKA: Yes. It reserves rights to the parties.

THE COURT: I'll read the sentences and then paragraph 15.

Reading from paragraph 13. There is a portion of the performance rights to ASCAP Music appearing on CTN programs as to which it would be impracticable for CTN or such producers to negotiate for licenses directly with the owners of the performance rights of said music, and then in brackets, without limiting the party's rights to reduce an offer of an additional proof with respect to

any subject, both parties specifically reserve the right to reduce an offer of proof regarding the reasons for such practicability, close brackets.

And ther, paragraph 15:

producers of CTN programs did not obtain such licenses and NBCTN and ABCTN had such licenses to the extent that CTN or the producers of CTN programs did not otherwise obtain the performance rights to the ASCAP Music, which they desired to use on CTN programming, CTN would be at a competitive disadvantage vis-a-vis NBCTN and ABCTN.

MR. HRUSKA: That language, your Honor, is not very beautiful in the sense of drafting. It was the result, as I am sure everyone here will remember, of intensive, hard, many hours of negotiations. Your Honor may recall there was at least one abortive closing before the stipulation was actually signed but it does in terms of substance make these very critical points.

I think the clear meaning of the second sentence of paragraph 13 is that there is some portion of the CTN music uses, an unquantified portion, which in practice is not obtainable by direct licensing.

By the way, let us, for analysis' sake, call that portion referred to in the second sentence of 13 'X", an

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whobtainable. That portion in brackets, let's call that

X. The clear meaning of paragraph 15 is that to the extent

X is not obtained and paragraph 13 said it was unobtainable

in practice. CTN would suffer a competitive disadvantage.

In other words, in a by-pass CTN would suffer a competitive disadvantage.

Now, the third sentence of paragraph 13, the reservation, does reserve the right to both parties to show reasons why X is not obtainable in practice.

And that reservation was of very great importance to both CBS and ASCAP.

There was one argument that ASCAP could have advanced as a reason for the competitive disadvantage which would have been consistent with the stipulation and if it were true and if it were established, arguably under one view of the law, it would have won this case for ASCAP.

And that was that CTN would suffer a competitive disadvantage in a by-pass because this is the sort of market which inherently cannot function by direct licensing so that the market would therefore not function under the injunction system or under a per use system and therefore under this argument the conclusion would be made that the present system must be left alone. That was an argument that they could have made. It would have been wrong. I think

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we could have disproved it very easily.

In effect, we have disproved it here in this trial in our main case. We have disproved it certainly through the evidence of the computer experts and the evidence of the producers and the evidence of Sipes, through the evidence of Fisher, all which goes to show that this market will function under a per use system and would indeed function under an injunction system.

as we know now, though, from the ASCAP trial memorandum, from arguments they made during our direct case, and really from the notes of designations of witnesses and documents, that ASCAP has not taken that position.

They have taken the opposite position. They argue now that a by-pass would not cause competitive disadvantage and that position, your Honor, is directly contradicted by the suipulation and what appears to be approximately 90 per cent of the proof that ASCAP plans to put in in its defense is proof which is barred by the stipulation.

A stipulation of fact is a binding judicial admission. ASCAP has stipulated to competitive disadvantage. A party cannot attempt to disprove a point to which it has stipulated. The same thing arose in connection with the CBS-BMT stipulation and we immediately conceded that point

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because that is the law and I think the same rule obviously applies to--

THE COURT: I am not sure what you mean when you refer to the same thing having arisen between CBS and BMT.

MR. HRUSKA: We have a stipulation with BMI which says in effect on the by-pass question, whatever is established as between CBS and ASCAP will be deemed established as between ASCAP and BMI and you remember Miss Kearse raised an argument at one point when we were putting in some evidence with respect to BMI concerning the non-exclusivity provisions of the BMI decree and she raised the stipulation quite properly in that context and we conceded the point.

THE COURC: All right.

MR. HRUSKA: The only argument, your Honor, that ASCAP has raised regarding this stipulation is that the competitive disadvantage to which ASCAP has stipulated is deminimize.

That argument, I submit, your Honor, is not worthy of the Court's serious attention.

say, is to mean, that it is non-existent in law and if every time parties stipulated to a proposition they left themselves

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free to prove that the proposition was non-existent, there would be no stipulations. To stipulate in that fashion is not to stipulate at all.

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All that must be shown here, forgetting for a moment the burden of proof, is competitive disadvantage and that is a stipulated fact.

As I said, the reservation of this right to show reasons why some portion of CTN music uses would be unobtainable in practice, the reasons why competitive disadvantage would be suffered, that was important to CBS as well as ASCAP.

right to show that those reasons for competitive disadvantage were not that the market would inherently fail to function in direct licensing, inherently fail to function in a per use system or an injunction system, if ASCAP were enjoined from licensing television networks.

I think we have shown these other reasons. We have certainly put in proof on the music and the canned problem, the advertisements and the canned problem.

It is perfectly obvious no television producer is going to go out and spend money for a right which CBS already has from ASCAP.

We have put in evidence concerning J. Walter

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Thompson. They don't have rights to public music in their commercials; they don't have rights to stock music in their commercials, they don't have rights to original music written for their commercials.

Mr. Poptis and I argued in May regarding the legal meaning of that contract. I think when your Honor mees that contract, there will be no question about it.

That is exactly what it says. That right is reserved, it says, jointly, to JWT and the writer, for licensing through ASCAP.

If JWT music tried to license directly without
the writer's consent, that writer would clearly have a cause
of action under that contract. I don't think there is any
question about it and that is a problem and this is such an
obvious point, I don't really want to dwell on it.

There can't be any question that it gives artificial bargaining power to the owner of the music recorded in that canned film or in that tape. ASCAP says, well. we will trust them, they won't hold us up. Well, that is simply not rational business behavior. No businessman is going to put himself in that position, if he can possibly help it.

Indeed, if there had been no stipulation on this case and even if CBS had the burden of proving compe-

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in the can and advertisements in the can, would shift that burden of coming forward and I don't know, meally, what valid points ASCAP could possibly make to sustain that burden.

Now, another reason for the competitive disadvantage in the by-pass or rather two interrelated reasons that we have proven, that we have shown, are these:

First, there are no present facilities, machinery in the market for direct licensing and in fact, that is a stipulated fact also.

Now, this is obviously of critical significance with respect to published music.

There is no way to put together programs requiring any significant amount of published music without such facilities.

Now, there are facilities in movie rights and in synch rights and in mechanical rights because there is a need for such facilities and I think it is obvious from the proof in this case that the need would be far greater here, performance rights for television networks, and ASCAP says to this, well, you have got only two measly variety programs, if I remember Mr. Topkis' description accurately, and you don't need direct licensing machinery

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for only two measly programs.

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Well, this argument ignores specials, daytime programs—focusing only on prime time—it ignores published music on series and perhaps most importantly it ignores the fact that in 1969 there were seven prime time musical variety programs and like everything else in television, records, in any form of public entertainment, public taste and types of programming go through great pendulum shifts and the television network cannot react to that phenomenon in variety programs of whatever, it is going to go out of business.

Now, the second of these two interrelated points on competitive disadvantage is this:

In order for there to be facilities, machinery for direct licensing, writers and publishers must affirmatively assist in creating that machinery. We could establish the most elaborate computer system and offices in the world and the whole thing would be totally worthless unless writers and publishers made it happen, made it go; unless they were to furnish the network in good faith and without having all of the information we need; unless they were to keep that information current, and that includes information on new songs, unless they were also to designate some human being who is set up, pre-programmed, ready and willing and

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able to deal, who is waiting for those phone calls from the producers and who knows what to do with them when he gets them.

Now, what does evidence show about the possibil: of writers and publishers coming forward with that sort of assistance to affirmatively take the steps and supply the information necessary to bring about for the benefit of CBS and, prospectively, other television networks the destruction of a system which they have been profiting under for 60 years? Are these people going to voluntarily, indeed, affirmatively, strip themselves of the bargaining power they possess as members of the combination? Are they going to affirmatively take the staps, incur the costs and hire the people so as to put themselves in price competition for our sakes? For the sake of the other television networks, customers who they regard as possession far greater bargaining power? Are they going to voluntarily and affirmatively give up something which they know and like so as to subject themselves to the rigors, the exigencies, the risks of a competitive marketplace?

Why would they do that? Why engage in such self-defeating behavior. They have an overwhelming economic incentive to make sure things stay exactly the way they are.

Why do price fixing cartels exist? Why are there

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organizations? Because they are of no value to the conspirators? Of course not. It is precisely because they are of immense value to the conspirators that these things persist until they are judiciously remedied. Indeed, this point, this inherent rock bottom basis for writers and publishers to preserve the present system against the television network by-pass is so obvious, so economically axiomatic, as Professor Fisher has made clear in his testimony, that it hardly requires an attoof, other than the few facts I have just alluded to. But there is obviously further proof, a great we lith and abundance of it. But it is not proof which was necessary to establish this basic economic fact of life.

It was proof principally put in to annotate

the proposition, to disclose fully writer and publisher

awareness of it, to disclose every single factual ingredient

which goes into this very natural, very understandable, from

their standpoint, desire to preserve a good thing.

In other words, this proof consists of the reasons which we left ourselves free to prove under the stipulation of competitive disadvantage and we have proven those. It was proof which has demonstrated writer and publisher have astute recognition and appreciation of what they have. It

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is obvious they would be aware of it. So would a ten year old child on a street corner selling lemonade be aware of it when he saw another boy across the corner coming in selling at a lower price. It's that obvious.

We have put it in here, so there is no question about it.

It is also proof which demonstrates a very great and very natural, from their standpoint, apprehension of change in the system, particularly for the custom of the television natworks.

A form of self annihilation, said Mr. Brettler the head of Shapiro Bernstein, a vice president of ASCAP, on the ASCAP board, a vice president of the IMPA and on the Harry Fox Board.

This is a man who knows the business. The end of the road for me as a publisher, said Mr. Morris. Buddy Morris. Buddy Morris has a very large percentage of the Broadway show tunes. He is one of the big publishers in Broadway show music and that is the kind of music we use.

I'll take you off my list, said Mr. Vogel--Mr.

Vogel, as an individual purchaser and basically a one-man operation, has the most incredible catalogue of songs. He is consistently in ASCAP's top 50 publishers, earning a great deal of money on those songs and he knows where he is.

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Adams, Stanley Adams, the president of ASCAP, said it very well in his famous umbrella speech to the AGAC membership. Every deal on the side he said is a tear in that umbrella and I don't know anybody who can walk in the rain and not get wet.

Mr. Kelman of AGAC, put it very well in his speech, dealing with the 3M. We do not believe that performing rights should be granted except by performing rights organizations. If you don't have performing rights organizations, you are going to be out of business.

Buddy Morris, again, and he said it all when he said, I have no intention of ever going in that direction.

Who has the most to lose by a television network by-pass which would lead to other television network by-passes if successful?

It is the old line publishers, the top 14 group of publishers, ASCAP in our discovery gave us statistics on those people.

Now, this group of top 14 gets proximately 60

per cent of the total ASCAP publisher creates every year.

Sixty per cent. Approximately 40 per cent of their distributions come from television network uses. Forth per cent of their total uses. And they supply us, CTN, with 44 per cent of the music we use measured by ASCAP rights, which is about

the only measuring system we have.

Now, this is a highly co

Now, this is a highly concentrated group. In reality, they run ASCAP--60 per cent of the credits, it is not surprising. The publisher members of the ASCAP board consistently come from this group of top people.

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stake here? Of course not. We have direct evidence through deposition or through documents and testimony we will have here at the trial with respect to the attitudes of just about everyone of them, and also we have proof here consisting of the additional interests that writers have in preserving the system against the bypass, the loss of their fund benefits, the loss of control over publishers, which they apparently feel they have for the ASCAP system. They lose if publishers were to engage in direct licensing of television networks.

There is a contention, almost a distrust between writers and publishers. This was the reason for the formation of AGAC and your Honor will recall who Burton Lane, the former president of AGAC was in referring to the fact that AGAC had collected over \$4 million in royalties that publishers had not distributed to writers.

All these factors came together in the 3M incident, although in far diminished form.

Your Honor, I wonder if I could break now and ask if there are any witnesses in the room and perhaps potential witnesses. Perhaps they might be excused until we finish this because I am about to get into facts which

I would prefer --

THE COURT: Mr. Topkis, do you know whether there are any witnesses in the room?

MR. TOPKIS: I know it very well. If there are any surprises in this case, that in itself is the greatest surprise I have had today.

Mr. Chiantia is here. If he need, I suppose he can find a quiet place somewhere. Can I inquire how long this secret material is going to cover?

MR. HRUSKA: I think I will be finished in ten, fifteen minutes, your Honor.

THE COURT: I don't feel very strongly about
the situation. Just to eliminate any question about what
your views might be influenced by what you hear, would you
mind waiting in the room back there? Is there anyone else,
Mr. Topkis?

MR. TOPKIS: Not so far as I know, your Honor.
THE COURT: Thank you.

MR. HRUSKA: I was about to say, your Homor, that all these factors that I have just alluded to came together in the 3M incident, although in far diminished form because the threat to the ASCAP system posed by the 3M bypass was so minor in comparison to that which would be

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posed by a television network bypass that the education we receive from the 3M incident applies here with tremendous 1: magnified force.

I won't go into all the facts of that incident. It would obviously take too long. I would like to
mention just a very few highlights and those basically
of a statistical nature.

only 700 songs. They offered every publisher they approached a great deal of money, as much as or several times the publisher's entire distributions from ASCAP with respect to wired music. That is Musak and Seeburg and the like, the shopping centers, the factories, the big office buildings.

That is what these established wired music services represent.

3M was going to sell to the small restaurants, the barber shops, the smaller factories, the shops, doctors and dentists offices which really didn't need it.

Now, every one of the publishers approached knew that they would make far more money by dealing with 3M than they would if 3M were to deal with ASCAP. That is so because when 3M had the entire ASCAP repertory to choose from, it was obviously going to be a smaller number from each

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of potentially 40, 50 publishers than it would be in dealing with just anybody.

of course, each of these people were offered a guarantee as to specific number of songs. They knew that in licensing 3M it was virtually a cause free transaction.

Sid Herman of Paramount-Famous said it was \$150,000 down the drain, pure gravy down the drain.

Now, nine publishers did not deal, all for reasons connected with the preservation of an ASCAP system. They did not deal despite the fact that at that time they knew that the ASCAP 3M negotiations had irretrievably come apart on structural problems and there was no possibility of putting it together before the time that 3M had to record, which was April '65.

Now, those nine publishers control 37 per cent of the music annually used on the CBS television network, 37 per cent, again measured in ASCAP rights. They have more than 56,000 songs in the ASCAP index of performed works and they annually receive approximately 46 per cent of total ASCAP publisher distributions. These are big, big publishers.

I think of equal significance are the reasons given by the two major publishers who did deal because those reasons make it perfectly obvious that those publishers would no more deal directly with CTN than they would hand out assign-

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It should be pointed out that those two publishers expected to receive from 3M as much as \$500,000 apiece, and I am talking now about the man who just left the room, Mr. Salvatore Chiantia on behalf of MCA Music, and Mr. Leon Brettler, as much as half a million dollars.

Mr. Chiantia said that in his deposition, put that figure in perspective, we are talking about 100 songs.

That is what MCA was to license. The mechanical rights of half a million dollars was 2/5 of approximately \$200,000.

According to Al Berman of the Harry Fox Agency,
the Muzak Company, for 3000 songs from the catalogs of
many publishers, pays only \$37,000 for a three-year mechanical
rights license or electrical transcription rights license,
which is a comparable formof license.

That is more than \$12,000 a year.

Mr. Chiantia got \$15,000 as an extra bonus simply for signing that 3M deal, \$15,000. That is more than Muzak pays Harry Fox for mechanical rights on 3000 songs for one year.

This record I believe, your Honor, has supplied the reasons for the stipulated fact of competitive disadvantage. It has demonstrated what this industry, including

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ASCAP, has always known, and which was admitted quite freely in the beginning of this case, that any large sale user in the United States would be courting conomic disaster by attempting to bypass the ASCAP cartal in the absence of the sort of judicial relief that would afform some measure of safeguards against these manifest problems.

ASCAP, again ignoring the stipulation, contends that competitive disadvantage cannot be shown unless CBS actually attempts to bypass and injures itself in the process.

time on this, your Honor, as you may recall in my going through the case law on the point. I won't review all that now. I would simply say this, Section 16 of the Clayton Act which speaks in terms of threat of injury, not actual injury, does not require that private antitrust parties subject themselves to such visibly ruinous acts as a precondition of maintaining an injunction.

of sellers could erect sufficiently high barriers against buyers dealing outside of the cartel, that cartel would remain immune from injunctions because the cartel can always dream up some alternative, some theoretical alternative to dealing with the cartel, and so long as the

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predictable so that no buyer would be so insane as to try
to alternative, then the cartel would have to be allowed
under ASCAP's theory to continue to stifle competition.

The antitrust laws, I submit, your Honor, countenance no such result.

In summary, if ASCAP's rights were exclusive, it would be a very, very simple case. The only question would be whether the market could function, and that question I don't believe really presents any question of fact any longer in this lawsuit, since the resul's under the non-exclusivity arrangement is exactly the same because any attempt to change it by bypass poses too high a risk of competitive disadvantage, and that is a stipulated fact in this case, that non-exclusivity provision makes no difference whatever in fact and therefore it makes no difference whatever to the legal conclusion which must be applied to this case.

Thank you, your Honor.

THE COURT: Thank you, Mr. Hruska.

MR. TOPKIS: I am utterly unafraid of Mr. Chiantia hearing any word I may utter, so if I can bring him back.

(Pause.)

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MR. TOPKIS: Your Honor, I will try to confine
my remarks to try and put us back in a factual context.

That is what I understood our purpose this morning to be.
I won't really attempt to answer Mr. Rhuska's legal arguments except to say that he seems always to want to argue the law, not talk about the facts. Perhaps this should tell us something.

We are concerned here with facts. It is facts
that determine legal conclusions. Unless and until you
have the facts, you can't draw any legal conclusions. Our
legal system starts with facts, and that is why we are
here in the courtroom.

non-exclusivity is not a real alternative to dealing with doesn't create a real alternative to dealing with ASCAP,
and for proof of that he mid, look at the fact nobody has
ever tried it, and because nobody has ever tried to deal
with individual publishers and writers, that proves that
we violate the antitrust laws. There is an excluded million
dollars missing there, I believe. It is almost as though
we looked at the fact that small boys eat icecream and
don't eat spinach, and attempted to conclude from that that
small boys were engaged in a boycott of spinach, or alterna-

tively that spinach sellers were engaged in a boycott of small boys. It is about at that level.

Obviouslythe fact is that ASCAP and BMI are great conveniences to users like CTN, to tavern owners, to everybody else. But the fact that they are convenient—Ira Rubin of NBC testified in a deposition and as he will testify here and now about facts—I testified that NBC deals with ASCAP because it likes dealing with ASCAP. It relies that there are alternatives, but ASCAP is a convenience. When it can get ASCAP cheap enough, it deals with ASCAP.

observations. There was some remark he made to the effect that SalChiantia got \$15,000 from 3M and that is true, and he said that that is more than Muzak pays for mechanicals a year. I suppose it is also more than Muzak pays for milky ways or office stationary, but so what? If he said something about what Muzak pays ASCAP or compared it to something meaningful we might have something. Compare it to perhaps what CBS pays to mechanicals.

This whole talking of mechanicals introduces irrelevance.

Finally, before I get or, as I edge my way into the facts, let me say a word or two about this stipulation.

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Four Honor will perhaps recall that in its

pretrial brief CBS jumped up and down on a couple of sentences

of the stipulation and didn't give your Honor the whole

text. When we pointed that out, there was a grumbling

acknowledgement that the stipulation did have a few more

sentences to it.

Now, it seems to me with all respect CBS wants to take simple propositions of logic and twist them so that they have us stipulating here what patently is not fact. I will not acquiesce in that and I will respectfully urge your Honor not to acquiesce in it. We didn't stipulate a word of non reality here, rather we stipulated a simple, logical proposition, that if CBS wants everything, it must be as a matter of logic that it won't be able to get every thing, it will be able to get something less.

We left for proof at the trial how much less.

We said to the degree that they didn't get less, and ABC and NBC didn't, to that degree they would suffer a competitive disadvantage.

The question is, and this is not solved by the stipulation, and if Mr. Hruska says it is, I want to be relieved of the stipulation. If your Honor reads it in that tortured fashion, I demand as a matter of fairness to be

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relieved of it. We had no such intention. If this case should go off on a stipulation of madness, I will scream down the housetops before I permit it.

Let me give you an example. There was a lot of talk here in the trial, facts, that Happy Birthday is generally inaccessible because it costs too much money and nobody ever plays it.

X that Mr. Hruska is talking about, that would be wholly in keeping with the stipulation, and to that degree if ABC and NBC wanted to spend the \$600 or whatever that Happy Birthday costs and CBS was a little more parsimonious and didn't, to that degree I suppose CBS would suffer a competitive disadvantage, somehow managed to lump along for years, nevertheless, but I suppose that is what the situation means. When they can't afford or decide not to pay for it, they can't get it. They will suffer a disadvantage and the same will be true of everybody else.

But the question is in this case: What are the facts? Let me remind you that we started this case with CBS through Mr. Sipes filing an affidavit against BMI when the issue was, should BMI get a temporary injunction or something like that:

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Mr. Sipes filed an affidavit in which he said
that as much as half of the music, of the BMI music which
CBS needed was inaccessible to it as he used the term
inaccessible. Balf was accessible, half was inaccessible.
That is what he said. That contention has long since
been abandoned here. Mr. Sipes managed to testify, I
think, for two days without ever mentioning the words access
ible or inaccessible.

Mr. Hruska's trial brief does not mention the word accessible or inaccessible. Mr. Hruska at no point during this trial, if my ears serve me, has mentioned the words accessible or inaccessible.

We are done with that nonsense.

what do we still have? We have the facts. We have Sipes testifying that we can get all the music we want, the only bar is disinclination. We have Dr. Stanton testifying to the same thing and we have Stanton testifying that if ever we went to a direct licensing world or a per use world, we would expect individual program producers and they supply us with all of our programs except one, the much heralded Gunsmoke. We would expect everybody to come to us bearing the performing rights in their hands ready to hand them to us. That is what we would expect, and to use Stanton's words, insist on.

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So those are the facts we are dealing with here. The facts are that all the music that CBS needs is available to it, freely available to it, either through ASCAP and BMI or through direct negotiations with the individual composers or publishers.

Like your Honor, I read through my notes on what happened during our five weeks in May. I went through the testimony of each of the witnesses, some of them I questioned I went through rather quickly, but we did have Mr. Sipes testifying that CBS could get all the music it wanted, the only problem was disinclination.

We had Wright, Vincent and Sunga, the happy
trio, all testifying in almost identical word for word language, which is a tribute, of course, to the rapport that
they share, all testifying that they are the producers of
television programs and they are very much scared. If
they had to deal directly they couldn't get the music that they
needed. When we reminded them that the Harry Fox Agency
existed and a fellow named Bernie Brody existed and Marion
Mingle was available, we could do it that way.

Funny, we never thought of that. Then we went to Miss Mingle. Why that sweet old lady was called to testify, I have no idea. Her business was licensing

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movies, but she testified and she was charming and she, it is true, did testify that she was disinclined. She said she wouldn't go to work for CBS because she was too old.

the manifest fact, that nearly all of the music that CBS uses today is background music. Mr. Hruska said a few moments ago Broadway show tunes, that's the kind of music we use. That just plain isn't true. We are going to show your Honor some tables of the music that CBS uses, and what you will see is that on variety shows those two variety shows a week, they play show tunes, but on the soap operas, the dramatic programs, the situation commities, the news programs, the documentaries, they use nothing but background music, and that background music is written to order by a guy whose job it is to write such music.

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He's hired by the program producer and he is paid a sum for doing that. That's the guy. The idea that this man could be disinclined to deal is just, you'll forgive me, nonsense. He's got a living to make, he knows that if he can sign on to write a series for the season, he can make a living, and if he can't sign on to write a series for the season, then he better learn to play the picolo or make his living in some other

Dr. Stanton and Mr. Sipes both testified that this per use license that they want would really be a non-use license, that they would expect the packagers, as I understand, uniformly to bring them performing rights. So the only reason that they urge is disinclination as to why per use or direct licensing wouldn't work, but as to per use they say and the reason they say they need per use is disinclination, but it would actually be non-use.

They want your Honor to go to the trouble to

fix rates for all of the music of the ASCAP index, which

I think is a couple of hundred thousand compositions and
they haven't told us whether they want those rates to be set

the same rate for every composition or different rates,
but that's where we are.

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All of this must be done. We have to have fixed rates proceedings, cathode rate tubes, the producers are going to come in with the music books. What you have to do is give CBS a club to enable them to do it.

There is I suggest a kind of paranoic quality
of this talk of disinclination. How can any songwriter
or publisher be disinclined to deal with the larges:
television company in the world? We will prove that.
The largest record company in the world? We will prove
that. The owner of the leading local radio station? We
will prove that. The owner of fast riding music publishing
companies? We will prove that. The owner of the largest
communications empire in the world? How can any songwriter
be disinclined to deal with this empire?

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It's like that old joke of what do you say to a 6,000 pound elephant? And the answer is, whatever he wants to hear.

Now, your Honor, I'll give you a brief senario,

We are going to start with Mr. Chiantia, who your Honor knows from the reading of the exerpts of the deposition and also from references to his name frequently here is surely one of the most respected members of the publishing field.

Association, he was elected to that presidentcy and to the ASCAP Board I might note after he dealt with 3M, so if it was a crime to deal with 3M, he's been remarkably honored for it.

We will follow with Mr. Alan Schulman, another publisher, who will also advise your Honor of the way the publishers work and what their function is and given your Honor a feeling for the facts of this business.

We will then follow with Mr. Michael Dann, with whose name your Honor is familiar. He filed an affidavit herein which--

THE COURT: I know him personally.

MR. TOPKIS: All right. Fine.

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Then you know his prior connections with CBS.
THE COURT: Yes.

MR. TOPKIS: We will then have Mr. Johnny Green, a distinguished composer and conductor, and following him, Mr. Arnold Brodio a serious music publisher. He heads
Theodore Presser, which is a publishing house I am sure your Honor is familiar with.

We will have Mr. Aaron Copeland and we will have another couple of writers, one other writer, I think, and I may say that this precise order I will have to ask indulgence on because I am trying to accommodate busy people's schedules.

These will be brief witnesses.

THE COJRT: Of course it makes no difference to me. I am sure you will do your best to advise Mr. Hruska, in particular.

MR. TCPKIS: Right. I am now indicating the order in which I expect them. Following Mr. Brodio we will have Mr. Herman Finkelstein, and then Mr. Robert Nathan, our economics expert and with that, we will conclude except for one witness, Mr. Aaron Ruben, the NBC executive. He has long been designated by us as a witness and he has told us that he will not be available to us, the 11th, and so we would request your Honor's and my colleagues friends'

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indulgence to put Mr. Ruben on when he can be made available. He tells us he will be available in the morning on that day.

THE COURT: We will make whatever arrangements are necessary in that respect.

MR. TOPHIS: Right.

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Now, I think that I can sum up very quickly because we expect to show that there is a web of delicate arrangements which binds together the music industry today, binds the creators and users of music and we will suggest to your Honor that if you, with all respect, barge in here and start making changes, there is no way under God's Heaven that anybody can forecast what will happen. You will be embarking upon a terribly risky course.

The reason given for it is that you have to do it because everybody is so disinclined. Well, we will bring people before you and we will ask.

I won't say anything now about the 3M incident.

I can't imagine what real relevance it has today and what did or did not deal with 3M ten years ago. I will say only that Alan Arrow of 3M testified that he got all the music he needed, that his program was a success and that he was very happy. He was a witness called by CBS.

THE COURT: I remember.

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MR. TOPKIS: There were some references by Mr.

Uruska in his remarks to programs in the can and commercials in the can. The funny thing about all that talk is that we have never any quantification of it. We know that they claim to have \$100,000,000 of inventory in the can but we don't know who owns the performing rights for the music in that hundred million dollars.

. There wasn't any testimony about that.

So, for all I know, CBS owns it. I don't suggest that. I just say that the record is blank. We have a subpoena outstanding to whoever made that estimate and we will hope to elicit the information so that your Honor can deal with a full record.

We will also hear Mr. Dann testify as to his expectation of whether CBS could or could not get performing rights if it doesn't have them to programs in the can.

The same problem of can people afford to say no to CBS or hold up CBS.

Commercials in the can was another hob goblin we heard about. Your Honor will perhaps recall Miss Marion Presston. The kindest thing I can say about Miss Preston is that her knowledge of this industry is in inverse ratio to her attractiveness.

We have a letter from her in which it becomes

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perfectly clear that there ain't no such thing as a problem of commercials in the can. We will show that to your Honor and she was the only witness, you remember, who testified about commercials in the can being a problem.

them is that J. Walter Thompson and every other advertising agency owns the performing rights to most of the music on commercials and the other is that if somebody got recalcitrant and didn't want his music used on a commercial which was already in the can you could say to him, goodbye Charlie for a couple of hundred dollars strip in new music that and would be the end of his life in the advertising business and how many people would dare to say no even to J. Walter Thompson, if they make their livelihood out of writing music for television commercials and that is my scenaric.

Thank you very much, your Honor.

THE COURT: Mr. Topkis?

Miss Kearse?

my opening statement at this point. I think Mr. Topkis
has done what your Honor asked which was to refresh our
recollection as to what went on during the month of May.

BMI expects to call several witnesses. We, of

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course have served notice of who those people are so I think perhaps we can just get on with it at this point.

THE COURT: Very good.

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MR. HRUSKA: Might I make a very few brief comments on Mr. Topkis' statement?

THE COURT: All right.

MR. HRUSKA: I won't comment on anything on which our two statements met.

Just where perhaps I didn't anticipate one of the things he was going to say.

This point on accessible and inaccessible. I suppose it is kind of frustrating in a way, every time we get an opportunity to talk about the case that there are some, I believe, quite applicable anti-trust doctrines here that if we were to spend time on all of them, we would really never finish.

One of them, of course, is tying. Tying is a notion which was brought in in a very early stage of the case.

It first came up in connection with the BMI motion for a preliminary injunction. At that point in time we were not talking about the disinclination of wraters to deal. There was nothing in the record or available at that point in time on that subject. There we were talking about transactional accessibility and incomessibility. The notion that what

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ASCAP does is to use inaccessible music as a tying product, compelling buyers thereby to obtain from ASCAP accessible music is still in this case. That is a, I think, very sound although perhaps in this context novel, anti-

trust point and I think ASCAP is doing just that, as is BMI.

However, it is so obvious that what is occurring is an overall stifling, elimination of competition, that the precise per se pidgeon hole that a particular program falls into or the number of per se pidgeon holes that it falls into is not of great significance and that is why we haven't been talking about tying, exclusive dealing, boycotting and the other anti-trust points that are still in the case.

Mr. Topkis said that Bob Wright and Duke

Vincent and George Sunca testified or-when they had recalled

to their memory by Mr. Topkis the fact that Brody and

Williams and Fox were in the business, they immediately

said, of course, that he can do it. That is not the

testimony.

it was if Harry Fox and Brody and Williams and anybody else had their organizations beefed up to the point where it would be the equivalent of the sort of per use machinery that CBS is planning to inaugurate in this market were it to obtain relief in this case, would then the transactional

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problems be cured and if there were no disinclination on the part of the writers and publishers to deal.

In other words, as the question was put to these witnesses, it came out to mean a situation which would be identical to the kind of post relief situation which we project which will occur in this market.

In other words, after there is judicial relief which changes the status quo and this system which is self-generating in terms of machinery is established, will the market then function, the answer to that of course is yes, it will.

Dr. Stanton's testimony in ceposition, Mr. Topkis made the point, it is in the ASCAP trial brief, I think the reply brief, the last statement, that Dr. Stanton said that he will insist that in a per use system or an injunct in system, producers of programes come into CBS with the rights already cleared and I really guess I fail to understand the significance that ASCAP attaches to that statement.

Obviously, in a system which ASCAP has been removed by injunction or in a per use system, it will be the producers 3 Sipes also testified who will be given by CBS the responsibility to license performance rights directly.

It is only natural that they do that. They license or buy all other program elements.

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Music performance rights is the only exception.

This doesn't make the per use license a non-use license as Mr. Topkis has referred to it. I simply do not understand why it would be. The per use license would be for the benefit, obviously, of the network. This is the means, the machinery by which producers can obtain the music performance rights if they need it, either through the mechanism of the per use license, the reservoir on a direct basis.

We have been through all of that and I don't want to rehash all that evidence. I simply comment on this because I think the term non-use license is really a non-secquitur.

THE COURT: All right.

Gentlemen. Ready to hear watnesses.

MR. TOPKIS: Your Honor, we will cal our first witness of our presumed proceedings, Mc. Salvatore Chiantia.

MR. HRUSKA: Your Honor, wile he is approaching the witness chair, as I say, your Honor, we do have the hold-over from last May of Miss Preston's testimony. Cross examination of Miss Preston had not been completed and of course we had not started redirect examination.

Miss Preston, I understand, would be available tomorrow morning if we can wrap up her testimony then.

THE COURT: Let's talk about it at a break in the

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proceedings and I'll be glad to consider that.

MR. HRUSKA: Also. There is the question of the CBS documents which at perhaps some early point we can offer in evidence.

THE COURT: All right.

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SALVATORE CHIANTIA, called as

a witness by the defendant ASCAP, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TOPKIS:

Q Mr. Chiantia, at breakneck speed, will you take us through your biography from the time let us say that you were in collecte?

A Yes.

I attended the City College of New York. I attended St. John's Law School. I was graduated from St. John's. I was admitted to the bar shortly thereafter. I then entered the armed services.

Q When was that?

A In 1941.

THE COURT: Which is that? When you were admitted to the bar or the armed services?

A I was admitted to the bar in 1941, your Honor.

THE COURT: Same year as I was.

THE WITNESS: That's right.

Q About a year later I went into the Army. I served in the Army for about five years and came back.

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Music?

MCA is also the parent company of what is now called MCA Records, which was formerly called Decca Records. MCA is the parent company of a bank in

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Colorado. It is the paRent company of the MCA

Development Company, which is a company which conducts the

tours on the MCA lot, the Universal lot, that is; conducts

the tours at Mt. Vernon and has recently acquired the

right to conduct the tours in Yosemite National Park.

MCA is also the parent company of a new company, MCA Technology, which holds the rights in a new audio-visual technique called Discovision.

That's about it.

Q Sounds like enough.

Tell me, if you will, Mr. Chiantia, this season, the current season, how many TV series does MCA have or Universal TV?

A I don't know exactly. We have about eight or ten.

- Q On the air today?
- A Yes.
- Q And do you do specials as well?
- A Yes. Occasionally.
- Q 60 or 90-minute special programs?
- A Yes.
- Q And is eight or ten typical of your annual output?
 - A We are very proud of the fact that we have been

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the leading producer of television motion pictures for some time now.

Now your responsibility is for music publishing.

Would you tell us, please, what a music publisher as you
perform the rule does.

A Basically, a music publisher acquires musical material or the rights to musical material and exploits those rights.

Q Could you expand on that a little bit, sir, and tell us how and where you acquire musical material?

either acquired directly from the writer or it is acquired from other corporations. For example, foreign companies will sell thier material to us for exploitation in this territory. We acquire it from corporations which exist in the United States, corporations which are formed, perhaps by an artist who writes his own material and them seeks someone to exploit the material.

That's just about where we get the material.

We also get material from our motion pictures, material which is written specifically for our motion pictures, and material which is written specifically for our television shows.

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Q Do you uniformly acquire all music written specifically for your motion pictures and television shows?

A Yes.

And your motion pictures that are produced for theatrical exhibition initially but for ultimate, one might hope, television exhibition as well, is that correct?

A That's correct.

Now, you said that your sources include? foreign suppliers. How do you get hold of rights to foreign music?

traveling and in the course of my traveling, I hear material which I think is worthy of acquisition and I try to acquire it. In addition to that, we have officers around the world and they are on the lookout constantly for material and when they find material which they think is good, they acquire it for us.

Q When you say acquire, what do you mean by that?
What is it that you acquire?

Mell, there are a number of ways of acquiring material. You can either acquire the copyright or you can acquire certain rights in the copyright or you can acquire the right to administer certain rights for a

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stipulated period of time.

And you have used all of those techniques?

A That's correct.

Q Could you give us some examples, Mr. Chiantia, of the kind of foreign music that you specialize in, if you do specialize?

A Yes. Over the years we have published songs such as A Man and a Woman, Strangers in the Night, C'est Si Bon, I Wish You Love, Domino -- I can't think of them all at the moment. But there were quite a number.

We'll make available a copy of the ASCAP
works index and I am sure you could find others but do I
gather from your listing thatyou specialize in popular,
rather than serious or classical music?

A Yes. That'sour specialization. However, we do publish serious music.

Q And where do you get that from?

A Well, we have had since 1944 a relationship with the Soviet Government. We were the exclusive and still are the exclusive representatives for their serious music in the Western Hemisphere.

Q Of all Soviet composers?

A "Yes, that's correct.

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Q And so far as American created music is concerned, do you specialize in popular music or do youhave serious classical catalogs there?

A We have serious music amongst the American composers, yes.

Q Sorry?

A Yes, we do have some American composers represented in the serious music part.

Q Could you name a couple of them?

A Robert Starra, Morton Sobotnick, well, those two are the most important.

- Q Now, wouldyou tell us --
- A Eli Sigmeister.
- Q Nobody will be hurt by being omitted so we'll go on.
 - A I hope not.

One way of getting music that you didn't mention, Mr. Chiantia, is having a young kid songwriter walk into your office and say, let me play something for you. Does that still happen?

MR. HRUSKA: I object, your Honor. The questions of course have been very leading and it's been background so I haven't objected but I think now we are getting closer to something of substance and I would

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THE COURT: Well, I can't believe in a sophisticated group of this kind it can't be a secret

street. They do or they don't.

request that the questions not be leading.

MR. HRUSKA: The question could be requested.

Q What other way or some other way.

one way or the other whether people come in off the

THE COURT: I don't like to use the nasty word first day out, but overruled.

A Well, there are occasions on which people will come in off the street but that is becoming rarer and rarer. There was a time when that was the main source of material, writers coming in off the street, and playing their material for us.

THE COURT: Then you made a movie about that.

THE WITNESS: That's right.

A But, that has become a rather rare occurrence.

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zb		Chiantia-direct 2864			
	Q	Well, if you had to arrange in order your			
soure	es of	music today, how would it run?			
	A	Well, I would have to say the main source of			
our m	ateria	l is now English and continental.			
	Q	And that is of the material that you publish?			
	A	That is correct.			
	Q	Now, you said that you also get all of the music			
from	your t	heatrical m ovies and your TV movies.			
	A	Yes, that's correct.			
	Q	Do you publish that music?			
	A	Yes, we do.			
	Q	When I say publish, I am using it in my perhaps			
simpl	istic	understanding of the term. I mean do you actually			
print copies of that music for public sale?					
	A	We do not print public copies of the background,			
no.	We pr	int copies of any future music that may be used			
in mo	tion f	satures. I took it you were referring to popular			
songs					
	Q	I was not solely. I cortainly meant to include			
popul	ar son	gs but it was exactly that misunderstanding that			
I tho	ught I	had led you into and I wanted to straighten			

at to include tanding that raighten it out. So you do not actually make, what are they called, print versions or graphic versions of the background and

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theme music which is prepared for your movie and TV shows?

A I wouldn't say that. There are occasions on which we do actually print the theme music from, or our television motion pictures and indeed from our theatrical motion pictures and we try to exploit them.

THE COURT: Is that distinct from back; round you mean?

THE WITNESS: Yes.

Q Theme music is a melody that is identified with a program?

A Yes, for example, the Mystery Movie theme which was written by Quincy Jones, we have printed that and we are making other arrangements of it for school use and we are trying to get as many recordings as possible. There is a recording on it currently and — excuse me, that was by Henry Mancini and Mancini himself has contemplated a recording of it.

Q I think I interrupted you, Mr. Chiantia. 1
was asking you to list in order the sources of your music.
Can we go back to that?

Mell, as I say, the main source of my popular material, popular songs today is English and continental.

We have a number of groups under contract. For example,

Gilbert O-Sullivan, who is a very popular composer, a

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performer today, we publish all of his material in the United States. The Moody Blues is a very popular English group, we publish all of their material in the United States and around the world.

We have recently concluded an arrangement with Elton John, a very, very popular composer-performer. As a matter of fact, I would characterise him as a super star and we are publishing his material around the world except for England.

So that you will see that we have gotten a great deal of material from our English company.

- Next in order after English sources, what would you describe as your source --
 - A Currently?
 - Q Yes.
- A I would say that next in line would be the material that we acquire from our motion pictures, television motion pictures and whatever material we can acquire locally.
- And now you are referring, again, just to popular music rather than theme and background music?
 - A Yes.
 - You speak of material acquired locally. What

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A Sorry, if we were referring to popular music,

I would say the next greatest source would be material

acquired locally. If you are talking about theme and

background music I would have to put that up to Number 2.

Q Let's talk, then, about music acquired locally.
What do you mean by that?

A Music acquired from composers, local composers here in New York and Nashville. In California. In Atlanta, Georgia.

Incidentally, Mr. Chiantia, going back to thems and background music for a second, you said that it was your uniform practice to acquire the music that was used on your theatrical movies and TV movies. To your knowledge, is that an industry-wide practice?

A Yes, I think it is.

Coming again to these local creators of music, could you tell the Court, please, about the relationship or interrelationship, if any, between the making of records today and publishing of popular music?

A Well, as I said, there was a time when songwriters would come to us and play their material and the publisher would be the fountainhead of all material. The

publisher would provide this material to recording companies. The situation has changed radically. Today we get vary few visits from authors and composers. We get approaches mostly from entrepreneurs. For example, a business manager of a performing group. A performing group which writes its own material. A business manager for that performing group would acquire that material in a separate company. He would then come to me or to other publishers and make an arrangement whereby I or other publishers would actively exploit that material. That is a very large source of material today.

Q Where does the record get made?

record is generally sold by the group to a recording company. In other words, the performing group is what we call, for want of a better term, a self-contained group. They not only write the material, they perform it, they record it and they own all of the rights in the material which they create. Recorded material and song material.

MCA has a record company of its own.

- A That's correct.
- Q MCA records.
- A That's correct.

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Q Do you publish all of the music which is recorded by MCA records?

A Oh, no.

"do you," do you mean does Mr. --

MR. TOPKIS: Yes, your Honor. Does MC\ Music publish all of the music which is recorded by MCA Records?

THE WITNESS: No, sir.

THE COURT: In other words, they record a lot of things that are not published by you?

THE WITNESS: Correct.

THE COURT: I see

ago, comes to you having made a record and says, we would like you to do the publishing or we would like to negotiate with you about doing the publishing, that group might or might not have released the record through MCA Records, is that correct?

A That's correct.

Q So there is no necessary relationship tetween the two?

A No, there is not.

Now, you have, I believe, a number of publishing bouses in the MCA Record -- in the MCA Music family, is

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that correct?

- A That's right.
- O You have Leeds?
- A That's correct.
- Q And what others?

now administer the rights of the Williamson catalog, Rogers and Hammerstein catalog. We administer the rights in the Spanka catalog, which is the Paul Anka catalog. We administer the catalog of Management and Agency Music, which is the company controlled by Tom Jones and Engelbert Humperdink In that company you will find all of the songs written by Gilbert O'Sullivan.

- Q You said, sir, that you administer a number of people's work.
 - A That's correct.
 - Q What do you mean by that?
- A We don't own those companies which own those rights. Those companies are owned by other people and we are, in effect, caretakers of those companies. We fulfill the publisher's function with respect to those companies.

THE COURT: You operate them, is that right, and you get a fee, I take it for that and they get whatever

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profit is left?

THE WITNESS: That is correct. There are Name ways in which it is done. You either get a management fee plus a share of the profits or a share of the profits -- it is a competitive situation.

THE COURT: All right.

Q When yousay that you administer or handle the compositions, exploit them, how do you exploit them, will you tick off the different ways, please?

A Yes. The traditional way, of course, is to go to a recording company or to a recording artist and try to persuade the recording company or the recording artist to record your material. Once that is accomplished, we try to get the record played, we assist the recording company in getting the record played. We have our own people on payroll who are specialists in getting records played at radio stations.

We print many editions of the compositions so that those editions can be circulated and can be played in many places where music is played. In other words, we do whatever we can to expose the material, to get it played and to get it before the public.

Q Sometimes print copies of it and attempt to

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get those sold?

A Yes. I made reference to that. We print
many editions, we print piano editions which are sold for
use in the home. Marching band arrangements, concert band
arrangements, string band arrangements, stage band arrange-

ments are all used in the schools.

You mentioned that you had a number of publishing companies. Leeds: Pickwick et cetera, to pull a tagline from a favorite joke of mine, why do you need so many?

A Well, again, in the case of MCA, a number of these companies were acquired. Leeds was acquired, Pickwick was acquired. Duchess was acquired, Champagns had existed, it was owned by Dacca Encords previously and when MCA acquired Decca Records, it acquired Champag Music.

MCA had a couple of comparies of its own. It had Hawaii Music, which was a BMI company, a repository for all television music written for MCA television productions and it had a firm called Northern Music, which was an amalgam of many different kinds of music. Motion picture music, television picture music, feature songs which had been acquired durin, the course of the years. In effect, Northern had all kinds of music and all of these companies came together under the MCA banner at one point.

O So that you have companies which belong to

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zb-10			Chianti
ASCAP	and	companies whi	ch belo
	A	That's cor	ect.
	Q	How do you	determi
compa	nies	or which comp	position
	A	Generally t	that is
of the	e wri	ter concerned	1.
		THE COURT:	X091 m
an AS	CAP w	riter, you p	at it in
on?			
		THE WITNESS	S: That'

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ng to BMI?

ne which songs go into which s go into which companies?

determined by the affiliation

ean if you get a song from an ASCAP company and so

s corract.

So I take it then that the sources of revenue of MCA Music include payments from ASCAP and BMI?

That's correct.

And also you get revenues from your success with records?

Correct.

What other sources do you have?

The sale of sheet music and from other uses of the music. For example, the New York Times recently printed a book in which a great number of our compositions were included. We received income from that source. There hage been occasions on which we have licensed some of our musical compositions for commercials. A very important source of our income is foreign.

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What do you mean by that, sir?

A Well, for example, we have companies around the world to which company we assign the rights in the music which we control and those companies in foreign countries also acquire material locally and we get royalties from these foreign companies.

Q Mr. Chiantia, in general terms could you tell
us, has there been any noticeable trend in sheet music sales
in recent years?

of income was the sale of piano copies. That, of course, disappeared somewhere around the fifties. Since that times the publisher has sold less in the way of piano copies but his sales have increased of collections. By a collection I mean an album of music, a collection of music. Perhaps 10 or 20 compositions.

THE COURT: You mean sales of sheet music in album form?

THE WITNESS: Yes, have increased.

MR. TOPKIS: Your Honor, I think I am ready to go to another subject. Would this be a good time for our morning break?

THE COURT: I think it would be.

(Recess.)

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BY MR. TOPKIS:

o Mr. Chiantia, just so the record may be quite clear, I almost said perfectly clear, but something grabbed me by the throat, you receive payments from ASCAP and BMI by reason of performances of your music on television, is that right?

A Yes.

Now, do you receive such payments not only for popular music and classical music and so-called feature uses of music but also for theme and background music?

A That's correct.

g Sc that when you, that is, MCA, sell a film series, a television series to, let us say, CTN or ABC or NBC, in addition to the compensation which you receive from the network, do you or do you not receive payments from ASCAP or BMI for the performance of the music contained on that film?

- A We do receive payments from ASCAP and BMI.
- Q For both featured uses and theme and background?
- A That's correct.
- Q Now, Mr. Chiantia, you hold an office with an organisation called NMPA?
 - A That's correct.
 - Q That is the National Music Publishers Association

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A That's correct.

And you are, I understand, its president? Q

That's correct. A

For how long have you held that title? 0

Since about '67 or '68, I believe.

Just let me ask you this: Was it before or after you first dealt with 3M?

My becoming president, was that before or after my -- I became president of NMPA after I dealt with 3M.

What is NMPA, sir?

NMPA is a trade organization, a trade associa-A tion.

In what activities does it engage?

It engages in promoting and protecting the A legitimate interests of music publishers.

Canyou expand on that, sir, what are the legitimate interests and how do you promote and protect?

Yes. The association is very active in seeking out infringers, mechanical and graphic infringers, for example.

> Mechanical and --0

Graphic infringers. A

What is a graphic infringer? Q

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A One who infringes on our exclusive right to print music. And a mechanical infringer is one who infringer on our exclusive right to license the mechanical reproduction of music. For example, a pirate might be considered a mechanical infringer.

- Q What is a pirate, sir?
- A pirate is a gentleman who --
- Q Jack, the Ripper was a gentleman?
- A Well, a lot of them try to take on the cloak of respectability so I say the word gentleman advisedly.

A pirate is one who reproduces recorded material of other companies without payment to those recording companies. And in many cases without payment to the copyright owner.

THE COURT: It sounds like a profitable business.
THE WITNESS: It certainly is, Judge.

THE COURT: When you ay that you go after infringers of our music, in that respect you are talking about the music of members of NMPA?

THE WITNESS: That's correct.

- Q Does NMPA have any other functions, Mr. Chiantia
- A Yes. NMPA is the owner of the Harry Fox Agency
 The Harry Fox Agency is an organisation which licenses on
 behalf of its clients the right to machanically reproduce

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the music owned by its clients. It also collects the money from recording companies and it also serves as an and it function.

THE COURT: You are talking about Fox through-

THE WITNESS: Harry Fox.

- Does MMPA perform any other functions?
- Besides promoting an protecting the rights of its members?
 - No, do you have a legislative role, for example?
- Yes, of course. That comes under the head of promoting and protecting the rights of its members.

THE COURT: Do you lobby?

THE WITNESS: Yes, we do, sir. We fight for legislation which would benefit our members and our authors and composers and we fight against legislation which would hurt us.

- Do many publishers or publishing groups balong 0 to NMPA?
- There are currently about 65 members, I would say of NMPA.
- Would that be publishing groups rather than individual corporations?

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Yes, I would say they are publishing groups in some cases; individual members in other cases.

- Just in the interest of a complete record, does any publishing enterprise owned by CBS belong to NMPA?
 - No. They are clients, however, of the agency.
 - Of the Harry Fox Agency? 0
 - A Yes.

THE COURT: April?

THE WITNESS: April and Blackwood.

THE COURT: When you talk about publishing groups, would MCA be considered a publishing group?

THE WITNESS: Yes, sir, because it owns more than one publishing company.

- By publishing group we mean the family of publishing enterprises under common ownership, is that right?
 - That's correct.
 - Does MMPA have any restrictions on admissions?
- No. All that is required to become a member of NMPA is that you are a publisher, that you engage in the business of publishing.
 - Does it have any joint activities with AGAC? Q
 - What do you mean by joint activities? A
 - I will take any definition you want. Q
 - The most recent example of joint activity is the

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combining to promote the passage of the copyright act and to promote the passage of the copyright extension bill.

THE COURT: In other words, where your interests are coterminous, you would work together?

THE WITNESS: That's correct.

- Q But you have no engoing relationship with AGAC?
- A No.
- Q Do you have any ongoing relationship with ASCAP?
- A NMPA?
- Q Yes.
- A No.
- O BMI?
- A No.
- Now, you are a member of the ASCAP board of directors, Mr. Chiantia. When were you elected to that position? If you remember. No naed to rack your memory.
 - A About 19 -- late 1968, early 1969.
- O That, too, was after you had dealt on behalf of Leeds with 3M?
 - A That is correct.
 - Q Do you hold any offices at ASCAL?
 - A Yes.
 - Q What cres?

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- A Vice-president.
- Q How long have you held that position?
- A Oh, about four years or so.
- Q Is there a publisher-vice-president and a writer-vice-president of ASCAP?

A I don't believe it is so designated in the bylaws but generally what happens is a vice-president is selected from the publisher membership of the board.

- Q There have been some testimony here, Mr. Chiantia, about a so-called AGAC form of agreement between a song-writer and a publisher. Are you familiar with that document?
 - A Generally, yes.
 - Q Does your company on occasion use it?
 - A Yes.

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THE COURT: I assume that's what you are

THE WITNESS: Yes.

In our case it's falling.

The use of your contract forms, :s that rising or falling?

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A To the extent that we are acquiring less compositions directly these days than we did formerly, I would say that the use is falling but in relationship to the AGAC contract, I would say it's rising.

THE COURT: Proper portion at least of the contracts you do use, you use more AGAC contracts?

THE WITNESS: That's right.

THE COURT: What are the reasons why you would use the AGAC contract at all or when --

those cases where the songwriter is a member of AGAC and in those cases we must use the AGAC contract.

MR. TOPKIS: Your Honor, I have here the two forms which Mr. Chiantia has supplied me this morning of his standard form contracts, the two that he referred to.

I'll ask that they now be marked for identification, I have just given them to Mr. Hruska who will doubtless want an opportunity to study them. We can discuss them after lunch.

THE COURT: Mark them for identification, please.

(Defendant's Exhibits AX291 and AX292 were marked for identification'

Q Mr. Chiantia, do I gather these are the two

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we came knocking at your door --

If CBS or a producer producing programs for

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now?

in conversation?

THE COURT: Whose door are we talking about

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MR. TOPKIS: The MCA door.

Q --- would you be inclined or disinclined to engage

MR. HRUSKA: Your Honor, I object to the question on the ground that ACAP's attempt to disprove the competitive disadvantage which ASCAP has stipulated is impermissible under the stipulation.

see to in that the stipulation is obeyed to the extent that it represents the understanding of both parties.

I'm not prepared at this moment to rule and I hope I never have to, as to whether you understood the same things when you entered into the stipulation. Nor am I prepared at this moment to hadre whether the testimony which is now being adduced would necessarily be inconsistent with the stipulation. You, however, protected your self on the record and I regard the question as one that will have to be determined in due course.

MR. HRUSKA: Your Honor, so I may avoid getting up at each one of these points, may I have a standing objection along these lines?

THE COURT: You may have a sitting objection.

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MR. HRUSKA: That's even better, your Homor.

I prefer that.

THE COURT: Do you want to ask the question again.

(Question read)

- A I would certainly engage in conversations.
- Q Would you go so far as to engage in negotiations?
- A If the conversation led to that, yes.
- Q You are a member of ASCAP and you are affiliated with BMI?
 - A That's correct
- Would that membership and that affiliation in any way block or hinder your willingness to negotiate?
 - A Not that I know of.
- Would you have any hesitancy at all that you would like to spread upon this record about negotiating with CTN or a producer working on a show for CTN?
- A Well, to be quite honest, I would rather continue licensing through BMI and through ASCAP. It is a much more convenient form of licensing and it is a form which has served the publishers and authors and composers well and I see no reason to depart from it unless CBS comes to me with a proposition I just can't refuse.

THE COURT: What do you mean when you say it's

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more convenient to license through ASCAP and B4I?

complex situation. It would be very difficult for a publisher to license his performance rights uniformly throughout the country and to police every use of those performances. It is a difficult task. That is not to say, Judge, that I believe that there are not cases in which a publisher cannot license directly. I think a publisher can certainly license CTN directly or NBC or ABC because there we have a known quantity of stations which are in the network. They are responsible organizations and it would be a fairly simple matter.

However, I would not want to be put to the task of licensing every ballroom in the United States or every skating rink in the United States or indeed every theater in the United States. That would be difficult, indeed.

THE COURT: Thank you.

O In saying that you can conceive no physical or practical bar to your negotiating with CTN and making a deal with them or with their producers, and I take it your answer does cover producers as well?

MR. HRUSKA: I object to the question, your Honor. It is a very leading question. There is in it ingredients which Mr. Chiantia did not specifically

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refer to.

THE COURT: Let me hear the question.

(Question read)

THE COURT: I don't think it's a complete question but -- will you start again and let's see what we have?

Q I think you just stated in response to his
Honor's question, Mr. Chiantia, something like that you
could deal with CTN whereas you couldn't very well deal
with every ballroom and theater and skating rink around the
country.

A That's correct.

MR. HRUSKA: That is precisely what I object.

to. For a lawyer to restate a witness' prior

testimony, put it in his own language and then have the

witness agree to that reframing of testimony --

THE COURT: As a practice, I don't think
it's good, Mr. Hruska, but I can't say that I think Mr.
Topkis has mischaracterized the testimony. My notes
indicate that Mr. Chiantia indicated in answer to my
question that there were distinct differences between
his attitude towards the possibility of dealing
directly with an outfit such as a television network on
the one hand and the smaller entities such as hotels and

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ballrooms and so forth on the other. That's all I understand Mr. Topkis to be recapitulating about. If you could ask the question without the recapitulation.

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Q Is there any difference between you and other publishers in your capacity or incapacity to deal with CTM or its producers?

A No.

MR. HRUSKA: I object to that question, your Honor. I do not think that this witness could testify about the capacity of all other publishers.

THE COURT: With all due respect to Mr. Chiantia,

I think I will have to give it very limited weight but he
is entitled to give us his opinion; he is an expert in
the field and you are going to have lots of fun crossexamining him on that point.

MR. HRUSKA: Yes. That opens up a great deal, your Honor.

Q Mr. Chiantia, you can sit back and wait for Armageddon but, meanwhile --

THE COURT: He is a lawyer. He knows what to expect.

from Mr. Sipes at the first part of the trial concerning the fact that CTN has a very substantial quantity of programs already in the can; that is to say, already filmed and ready for exhibition, and he testified further that he was concerned that if CTN no longer had an ASCAP

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license and a BMI license, CTN would have great difficulty in getting licenses for the performing rights of the music contained on that material, so to speak, in the can.

I would like to invite your comments, sir, on whether Mr. Sipes' testimony was accurate.

THE COURT: I don't see how he can.

Honor -- that is to say, in the event that CTN dropped its ascap license and there is included in its repertory of material in the can music on which MCA has the performing rights, would you please tell us how you would expect the negotiations between CTN and MCA for those performing rights to bill?

THE COURT: I take it the question really is the last sentence.

MR. TOPKIS: Yes.

THE COURT: That is, if CTN dropped its license, how would you expect to negotiate with CTN with regard to performance rights of music in the can?

MR. TOPKIS: Right.

A I would say that I would expect to deal no differently with that material than I would deal with material which CTN would want prospectively.

Q Why is that, sir?

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A Well, I assume that if CTN has no license with ASCAP, they are going to be knocking on my door or I will be knocking on their door some time in the future for the use of my material and I certainly don't want them to slam the door in my face, do I?

- Q Is there a question mark at the end of that?
- A Yes.
- Q Have you had any experience with networks or producers coming to you to negotiate for rights? I am not limiting myself to performing rights.
 - A Yes.
 - Q After a show was in the can?
 - A Oh, sorry. I answered too soon.

After a show is in the can? There may be cases, Mr. Topkis, and I am not quite sure of this, there may be cases where a producer of a television feature will come to us to ask for a synchronization license and, in those cases, we would certainly negotiate.

Now, I am thinking specifically of a show which was originally produced for television and some time subsequent to that the show was to go into syndication.

We would certainly not withhold the license, although I am aware that at this time many of the shows get those licenses in advance. I would certainly not be indisposed to

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granting a license under those circumstances.

take it.

THE COURT: With regard to the actual history, so far I get the impression from your answer that there

may have been, but you are not sure, one or two such instances and, in any event, it has been pretty rare, I

A No. In the early days they may have been more quent, Judge. I am trying now to pinpoint the situations and, quite honestly, off the top of my head I can't remember any.

Perhaps during the course of the testimony I will think of some.

Q How about the Tonight show, Mr. Chiantia?

A The Tonight show is a -- we have never refused any synchronization licenses to the Tonight show.

Q Are those always asked for after the show has been broadcast once?

A I don't deal with the licensing directly, Mr.

Topkis. My experience is that we have never refused

anyone any synchronization license, no matter when it was

asked.

was afraid of being held up.

Have you ever held up anybody?

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A Hardly.

MR. HRUSKA: I couldn't hear the answer.

A Hardly.

MR. TOPKIS: Hardly ever is not what he meant.

MR. HRUSKA: I would like to interpose an objection to the last question for the record. I was rising when the answer was given. It was such a short question and a short answer --

THE COURT: Well, I don't think anybody can expect the answer or the question to mean very much.

You have to get down to specifics, you know.

MR. TOPKIS: Yes. I agree.

THE COURT: Clearly, it is a generalization at this stage. I don't know what Mr. Chiantia considers holding somebody up.

Judge. That's a relative term.

Mr. Chiantia, there have been times when you have sold synchronization rights before a program was in the can and there have been times when you sold synchronization rights after the program was in the can, is that correct?

MR. HRUSKA: I object * > that.

A I would say -- sorry.

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MR. HRUSKA: I object to the question again on the ground that it is counsel's restating a prior It is not a question of whether counsel mischaracterized the prior answer, your Honor. I believe it is a question of counsel putting things a little more succinctly perhaps than even this very sophisticated witness has done and cleaning up the record, making it just a little clearer.

THE COURT: Well, unless it changes the quality of the evidence, I would be very glad to have the record cleaned up and I really don't think that where is no jury involved and where we have lawyers astute enough to regard the situation and a sophisticated witness, that we need be concerned about the formalities.

MR. HRUSKA: This restatement, I believe, was inconsistent with the witness' former testimony. My understanding of what the witness said was that he did not specifically recall an instance in which synchronication rights licenses had been granted after programs were put in the can.

Mr. Topkis' question recharacterized the testimony in a way in which the witness would have indicated, had he agreed with that question, that he had such a recollection.

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A Your Honor, may I help at this point?

THE COURT: I wish you would.

A I believe the question here is whether a music publisher would take advantage -- let us discard the term holding up -- whether a music publisher would take advantage of a situation in which something has already been recorded and a license is subsequently sought.

that has arisen in the licensing of mechanical reproduction and in the licensing of motion pictures, theatrical motion pictures.

Wery often, a theatrical motion picture will made and the song recorded and the synchronization license is subsequently sought. In those cases, speaking for MCA, we have never held up anybody. We have never been unreasonable. We have licensed.

In the cases of mechanical reproductions,
there are cases in which recording companies actually
record a song before ever asking for a license. In whose
cases we would certainly hold them up if we wanted to,
but we don't because it would be bad business practice.

There are some people in our business who make a habit of being unreasonable. There are a number of people. You mentioned Happy Birthday before. There

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is another very famous person with whom I have done a great deal of business, who lives in Paris, who makes my life miserable because she refuses to allow me to license under certain circumstances.

Well, those people are generally identified and people watch for them. Certainly in my business of being a music publisher I don't know of any company that has ever had to say, "Watch out for Chiantia or MCA; they'll get you".

We know that we are in this business and we intend to stay in this business and the way we stay in the business is by establishing some kind of a rapport and good will with our users and customers.

- Q Mr. Chiantia, would that rapport and good will apply as much to and advertising agency which had commercials in the can as to anybody else?
 - A Well, certainly.
- Q Mr. Chiantia, you spoke of situations where you granted licenses to a record company after they had made the record.

Of course, there is the so-called --

- A Compulsory license.
- Q Is that what you were referring to or were you referring to something else?

A Well, even the context of the compulsory
license -- I am aware as we all are that there is a compulsory license -- but there are two situations --

THE COURS: Will you elucidate what you mean by the compulsory license?

A Yes. Under the copyright law, a copyright proprietor is obligated to license the mechanical reproduction of his composition to anyone once he grants the first permission.

There are cases, let us take the cases that come squarely within the compulsory licensing provision, thee are occasions, and they are increasing lately, in which recording companies will record material especially for premiums or get material together for premium packages.

Now, this is stuff that is already recorded, already inthe can and, indeed, in many cases the packages have already been put together.

In that case, they come to us not for a license but for a reduced license. There are cases in which we will negotiate.

I see a look of satisfaction on your face, Mr. Hruska.

But, there are times when we will give the rates, if there is a good reason to give them, and times

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when we will refuse the rates but that is purely a business decision.

Now, there is another case where a record may be made for the very first time. In that case, and I must confess that those occasions were more numerous in the past than today, in those cases we could certainly charge any fee we wanted to charge. We could charge 8 cents, 10 cents a record but we didn't do it because it would be bad business.

We want the door to remain open for us and if you start holding up record companies or the people with whom you do business, you are in real trouble.

- Q Mr. Chiantia, you have heard discussion of the so-called per use license.
 - A Yes.
- Q And CBS's objective here. Are you familiar with it in broad terms?
 - A Yes.
- Q On the basis of your experience with music publishing down through the years, could you tell us, do you perceive any idvantages or disadvantages, difficulties or benefits, which would flow from the adoption of the per use license?

THE COURT: Before you arswer that, Mr. Chiantia,

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I think that this mestion has been put to other with eses and I want to be sure that Mr. Chiantia is proceeding on the same hypothesis that other witnesses have been asked to proceed on

MR. TOPRES: All right. I will be delighted to read to Mr. Chiantia --

THE COURT: Jus: to be suce that he is talking about the same thing that we are.

MR. TOPKIS: Could we do it this way? I have the document that CBS filed ---

THE COURT: Do you want to let him read it? MR. TOIKIS: It occurs to me that I could ask him to read it over the noon recess.

THE COURT: All right. And then you better put a copy before me, so I can remember what it is.

Q Mr. Chiantia, there has been testimony here from Mr. Arrow, I believe, and I am sora Mr. Hruska will straighten me out if I misstate it, that you dealt with 3M in 1964, is that correct?

- A That's correct.
- That is, it is correct that you dealt with them?
- That's correct.

MR. HRUSKA: I think the date is not correct, your Honor.

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		MR.	POPKIS:	n kne	w I w	vou.	i gat	: halp.	
		THE	COUPT:	Let.'s	jast	ask	Ma: .	Chiantia	wi a
year	it wa	13, i	f he rec	alits.					

- As I understand the question, you are brying to determine whether I dealt with Mr. Amon. on the Minnesota Mining license in 1964?
 - Q Or at any other time.

 THE COURT: Whenever it was.
- A My answer is yes, I did deal with Mr. Arrow.

 THE COURT: As president of Leeds or at least
 as the manager of Leeds?
 - A That's correct, sir.
- Q There has been something said about your receiving some kind of \$15,000 fee in connection with that dealing.
 Will you well us, please, boy that came about?

Yes, I will be very glad to.

In the course of negotiation it was explained to me how the advances were made up.

- Q The negociation with Mr. Armow?
- A Mr. Arrow, that's correct.

money. I wanted more money than \$30,000.

As I recall, the advance we received was \$30,000. I kept telling him I wanted more than \$30,000. He said

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something about no: keing able to do it because of his commentments to other people.

Some time in 1965, I repeated this to Mr. Arrow and told Mr. Arrow that I was not satisfied with \$30,000 and I did indeed want more money and he said he could probably justify giving me an additional \$15,000 in view of the great help I had been to him in the Minnesota Mining project.

He said that he would have to disguise it as a consultant's fee and the proof that it is not a consultant's fee is that it was an advance against the royalties to be earned on the contract. It was not a consultant's fee. It was just another way of giving me more money in order to induce me to go into the program.

I hesitated to testify to that before trial. because it was embarrasing not only to me but also to Minnesota Mining but, since it comes up and since much has been made of it, I think I better put it to rest.

That is exactly what it was. It was not a consultant's fee.

If it had been a consultant's fee, it would not have been an advance against our royallay.

Q So Leels got a 845,000 advance against royalties?

> SCHOOL BIRLINGS CONTRACTOR AND SERVICES PATER STATE COLLE

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4 Yes.

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it came time to figure out how much royalties you were entitled to, that was credited in favor of 34 as pagment?

A That's correct

did the company?

A Mo. The company, sir.

with Mr. Chiantia. I know it is a little early but if we can take our lunch break now, I can have him ready, read this over the lunch bour.

think you ought to be in time, I am willing to go until
2 o'clock. Otherwise, we will come back at a quarter of
two.

MF. TOPKIS: Whatever your promised prefer.

I am moving rapidly, I think.

THE CCURT: All right. 2 o'clock.

(Cunchaon recessa)

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and the contract

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10. TORIS: If your coast places.

The Count Proceed, Manage.

ECHOE, I would now like to offer in suchance the two doormeans that he is been marked as ARIS. for adoptination and ARASS for itematication. It is not been offered by me, they were originally desication by such as

THE COURT: Are there any objections?

MR. HOUSKA: Fo objection: Your Honor.

THE COURT: Received.

(Defendant Exhibits 1923) and A8292 were received in evidence.)

SALVATORE CHIANTIA TOSHNOL. BY MR. POPKIS:

I gave you a copy of the CBS document dated May 9, 3973.

entitled "The Elements of a Per Use License."

Eave jou had an opposituality to med thurs, sir?

A Yes,

Mr. Chiantia, would you please tall the Coar: as you perceive them, the advantages and dissipational see, the benefits

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and burntens under sound alex from a log dea of that your so license system

A I can only think of that, It. Morkers on terms of the burden it would impose on MCA Hasio. I want it and in a par usa license CBS would have a chemule of them the by the Court or by negotiations directly with ASCAT and Bill and I also take it that I would be steel on I said of uour company, to withdraw compositions, acre or permit n ox all compositions at any time.

I con t see what adventage a mound how. to the draw any compositions. I really don't believe that the par use theense would produce that kind or competitions atmosphere which tibs seems to want in this case. Mist am I competing against? I am competing against and celling If I ware to withdraw my corpositions face the thomas, per use license, presumably CBS yould done to de busy of an they absolutely needed my campositions. There are cases where compositions are interchangesole and they would not ascessarily have to use, for example, . Will Navec Smile Again instead of Misty. The only case where Cos would not to me world by a case in which one of my somewhich ant acc wers going to appear on a program and the would to an an absolutely incomponental that that art at parformar would have to sing or what program the song which is his deer an

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and I would have come 'organize position. However, ever me there have there in a limit to what I can esk because my artist might be very unhappy if he new coinc presented from performing that exemposition on a CB; show. In the have one andy wallnams show, which he longer exists, has my variety show which his exist on CBS, my artist would be a lately makeppy if he would be prevented from slagues has many because of my instatement on a high performance for.

the situation which you would expect to prevail in the event that you with hew your catalog from coverage of the per use license?

A Precisely.

you or would you not withdraw your catalog?

what happens at the time. I just don'thmore.

license arrangement, can you foresse, based on your experiences, any consequences for the mand industry as a whole resulting therefrom?

tion a great deal. I don't see how it is going to tosis:

THE REPORT OF A CONTROL OF THE CORN.

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competition at all. After all, we have three newsorks to which we can apply for network performances. Online a very large retwork and a very large mean of avair.

be cut out fixe CHE values CES actually needed a song.
That is the way I see it.

ing by CBS any impact on the industry as a wholes

with the per use linease or be effectively out out of the CES network.

- from coverage by the per use license, would that in your judgment have any impact upon the writers whose compositions were within that publisher's catalogs
- case careain compositions are laded interchangeable.
- Which is within your catalog and three of many other publishers:
- as I understand from the per use limins, a license -- can't you hear me?

MA. HINSEL: Just barely.

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a Timesorry. Presumably in that case, if I and stand your per use scheme correctly you would be fact, get no performing wights directly throw the producer of the program.

asking you now, by Chiantla, suppose you within your repercons from consequence of the CBS per use license. What effect would that have on the writens and specifically, on the thems and background music uniters whose scapesitions were within your catalog?

you and tell you that that withdraval of theme and he kyround music would not be my decision. That would be a decision that would have to be made by the studio. In other words. If CBS or anybody class came to our studio and asted to acquire programs which our studio was producing and to acquire at the same time a performing right that would be a decision which the studio would have to make and not me.

THE COURT: Which studio?

THE ATTMESS: Universal Tile iston.

popular music that would be covered, might be covered by the per use license, is that right?

A That's right.

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THE COURT: In other words, you are expressing no opinion as to what the effect of the withdrawal of your entire catalog, is it occurred, would be on theme and background composers, which is what I understood Mr. Topkis was asking.

MR. TOPKIS: That's right.

A Well, Judge, if I understand it correctly,

if I were to succeed in convincing MCA to allow me to with
draw all music, including theme and background, MCA might be

faced with a situation inwhich it would have to pay a

composer who writes the theme and background music a substanti

ly higher fee because in that case I would then be in a

situation where I would be -- I am a bit confused here. I

am terribly sorry. I am a bit confused.

understand that you personally, and even your particular branch of MCA would not make the decision as to whether theme and background music was withdrawn or wouldn't in the ordinary course of business. You suggested by your last answer that maybe since it was a somewhat interrelated question, the remainder of your catalog, that you might be —but let's not worry how the decision is made. I don't think that is a part of your question.

If the decision were made, in whatever is the

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proper source of making that decision, within the MCA group, to remove theme and background music from the per use license arrangement, do you have an opinion as to how that would affect the composers or MCA, I think you were starting to say how it would affect MCA.

have to negotiate with a television station for a fee which would cover the use of the music. Now, as we -- as I have learned, it is a very competitive market and in many cases when MCA produces a television show, it very seldom gets back its full investment on that first run and I don't see how in that competitive market MCA could ask for more money to cover the use of the music. MCA would be faced with a situation where it might very well have to pay a composer more money to compose the background music for a particular series because the composer might say, well, I probably won't be getting any performing fees.

Mr. Caiantia, in your view would the consequences of the adoption by CTN of a per use license be reasonably predictable or would it be very difficult to appraise them?

A Well, the only thing that I can reasonably predict
is what I have already stated, that if I were to withdraw
my catalog from this per use arrangement my catalog would

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be used only in those instances whenit was absolutely necessary to use it.

- Q And are there other areas in which in your view the consequences would be unforeseeable?
 - A I would like to think about that a little bit.
- Q Well, I am afraid you are going to have to do so very quickly because that is my last question.
- A If I don't think about it, I am sure it will come out in cross-examination.

MR. TOPKIS: Fine. If not I will come back to you. Thank you very much.

MR. HRUSKA: Is the order that CBS will crossexamine first and then BMI is to follow or do we start with BMI first?

THE COURTY It makes no difference to me.

MR. HRUSKA: I just jumped up and then it occurred to me.

THE COURT: Do you suggest something else?

Maybe it would make more sense for both defendants to examine first.

MISS KEARSE: I have no questions at this time.
THE COURT: All right.

CROSS-EXAMINATION BY MR. HRUSKA:

O Mr. Chiantia, I must say you confused me with your

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last series of answers on the per use system and maybe
it is attributable to the fact that you didn't have parhaps
as much time to study that proposal as necessary, but let me
ask you a few questions on it. You said something about
if you withdrew your entire catalog of songs — by you I
mean MCA Music and its various publishing subsidiaries and
affiliates — that composers would not get a performance
fee.

That, I must say, completely threw me. I don't understand how you got to that point. Could you perhaps ---

A Can we separate the two -- popular music from theme and background music?

Q Sure. Do it any way that makes it easier for you to answer.

license scheme, if I were to withdraw my compositions, the only time that you would use my compositions, my popular compositions would be in those cases in which it was absolutely indispensable for you to use them. To that extant my writers then would be deprived of performing fees with respect to many of the compositions which are interchangeable and which you could interchange very easily.

You could substitute, for example, Misty, for

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I'll Never Smile Again. And my composer of I'll Never Smile Again would lose that money.

Now, in the present system where you have a blanket license, a producer of a program doesn't really give much consideration to that. The first song that comes to his mind, maybe I'll Never Smile Again, and he will use it.

Q Let me back up a little bit. Now I see what
the problem is. First of all, do you understand that in the
per use system proposed by CBS, you are under no compunction
to remove your entire repertory. You can remove any one
or some songs that you please, you understand that?

A Yes.

some of y ur compositions or any of your compositions from the per use reservoir for specific kinds of uses and not for other kinds of uses? For example, you can remove composition A from the reservoir for feature performance leaving it in for theme and background performances, youunderstand that?

A I understand it now. I didn't understand it

Q I see. Do you also understand -
MR. TOPKIS: Excuse me, your Honor, before we
leave that subject, do I understand that that is another

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modification of the per use proposal?

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MR. HRUSKA: That has been with us, your Honor

MR. TOPKIS: It is not in the per use proposal.

THE COURT: I haven't read the exhibit in the

last half hour --

MR. HRUSKA: It is in there, your Honor. Do you see it, Jay?

MR. TOPKIS: No.

MR. HRUSKA: Shall we hang up on this, your Honor. This is a point which has been briefed before, it has been mentioned before, it is --

MR. TOPKIS: What does CBS want?

THE COURT: I will proceed as if Mr. Hruska is correct here. If it turns out that he is not, we will have to make whatever ---

MR. TOPKIS: But the problem, your Honor, is that Mr. Chiantia had a document that does not contain that provision.

THE COURT: The purpose of his reading that -nobody is claiming he was wrong or right. There is no such thing as far as the expert is concerned here, the sole reason for my asking that he read it was so I would be able to determine what assumptions he had in mind whenhe was testifying. If Mr. Hruska wants to ask him about other

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assumptions at the moment I will allow him to do so and we will clear up hereafter whether that is actually part of the record or it isn't.

MR. HRUSKA: I just mentioned this was part of the Sipes' testimony. He said this on direct.

THE COURT: Gentlemen, I think we are going to have a lot of problems if we argue with each other about what happened six months ago. It is in the record or it isn't in the record. If it isn't in the record, counsel will be free to point that out to me at an appropriate time. Let's not hold up the witness.

you withdraw compositions, either entirely or for particular types of uses from the per use reservoir, that you will have an opportunity to send to CTN any information you care to send to CTN regarding those withdrawn compositions such as the name of the person within your organization who is prepared to deal directly on performance rights for that user, any pricing information that you may care to provide CTN such as prices for particular — minimum prices for particular types of uses.

Are you aware of that, sir?

- A Yes, sir.
- Q Take a film program. Let's say a dramatic

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program which contains a nightclub some and let us
assume that the product of that program has made a decision
inhis mind that he would like to use one of your compositions
in that scene because it is appropriate for the scene.

And he calls up the music clearance section in CBS, he gets a status report on your song X, and he learns that your song X has been withdrawn by you fro the per use reservoir and he also learns that the name of the man within your organization who has been designated as the person to contact for a direct license is Mr. Sal Chiantia.

Do you have any basis for concluding that that producer or somebody on his staff would not call you on the telephone at the number given in the information sheet that you have sent to CTN in order to negotiate rights for that song?

- A No, I have no basis for that.
- of yours to deal for sync rights, isn't that true?
 - A Right.
- Q And so in this system the same call could accomplish both a negotiation for sync rights and for performance rights, isn't that true?

Chiantia-cross

A Up to a point, ye	A	Up	to	a	point,	yes
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- Q What is the point, Mr. Chiantia?
- A The point is very simple, Mr. Hruska.
- Q What is the point up to which or beyond which you feel this could not go?

A If your producer calls for a sync right and a performance right and the performance fee which I quote him is considerably higher than the per use rate which has been established by the Court or by negotiation, he probably will not use my song unless that song is absolutely indispensable.

- Q Isn't that competition?
- A I don't understand your system of competition.

 I will tell you what I understand by competition.
 - O Please do.
- I can for my songs and you pay as little as you can.

 That is competition to me. I don't believe that any system in which I am trammeled in any way is competition. If I am going to be trammeled, you be trammeled to the same extent.

 Let's talk about competition. Don't take a license from ASCAP. Don't take a license from ASCAP at all and come directly to me for a license. Do you think for a moment I am not going to talk to you? Do you think for a moment I am not going to talk to you seriously about getting on

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your network? Of course I am. But I don't like a system where I have a ceiling that I have to compete against. You have established a ceiling. And according to that, you want to come back into court and renegotiate and lower the ceiling on the basis of your experience.

I don't want to bid against a ceiling. Why not you bid against the ceiling? Why don't I put a ceiling on it and you bid against it.

petition? Let me have the right to sell NBC my entire catalog if I please. You won't want that. That is competition. That is what I understand is competition. I don't understand that your system promotes competition at all.

THE COURT: May I ask you what would prevent
you from selling your entire catalog to NBC if you want to?
THE WITNESS: I can sell it now, but I understood that I wasn't supposed to do that.

Q Do you think NBC is going to be paid for that right?

A I beg your pardon?

THE COURT: Wait a minute. You say you can do it now? And that you understood that under the CBS proposal you would not be allowed to?

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THE WITNESS: That's right.

THE COURT: We will check that out later.

MR. TOPKIS: That is a legal matter, your Monor.

THE COURT: I just wanted to understand Mr.

Chiantia.

You say now you could, you have the right to sell your entire catalog to NBC, is that right?

A Right.

Q Do you think NBC has any conceivable interest in buying rights, licensing rights to your catalog directly from you in today's world?

A I have no idea. NBC is apparently very happy with the system they have. They have been using it for a long time.

- Q NBC has a blanket license from ASCLP?
- A Right.
- having a blanket license from ASCAP, thereby
 having a blanket right to use your music, do you think

 NBC is interested in paying you, again, for that same right?
- A No, but if NBC were to cease doing busines s with ASCAP, cease having a blanket livense, it could very easily go and negotiate individual contracts in direct licensing.

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Q You have the right now, Mr. Chiantia, I believe, to withdraw your entire catalog from AECAP, don't you?

A That's right.

Q Why don't you do that. If you withdraw your catalog from ASCAP, then you can negotiate with MBC?

A I have no reason to do so. I am perfectly happy with the system we have now.

Q Let's backtrack. You talked about a ceiling price in the per use system. To make this simple, let's concentrate on one of your songs. Maybe to give it some real live figure, just name one of the so gs in your catalogs, one of your popular good old standards?

- A I'll Remember April.
- Ω I'll Remember April?
- A Yes.

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3 that.

"I Remember April," I a having difficulty with

You don't have a one-word name? I'll take

it.

- A Take "All Or Nothing At All."
- Q All right.

Mr. Chiantia, you are not helping me.

- A That's not an offer.
- Q Let's call it April.

Now, take your song, April. Now, assume that a per use system is inaugurated and you pull April from the per use reservoir. In other words, at this point in time, ASCAP does not have the right to license CTN to use April.

Now, do you believe under those circums:ances that a ceiling price has been established for the song, April?

A No, but it has been established for songs that are interchangeable.

April, they could very easily use Misty has a ceiling price, you also reserve the right to go to the publisher of Misty and try to get it at a lower rate, although why that publisher would give you a lower rate is some-

thing I cannot understand.

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Q If the song Misty has been left in the per use reservoir, let's assume that it has been left there because the price available to CTN and the producers under the

per use system for Misty is a price that happens to make that particular publisher happy.

- A But, my deal fellow, you are talking about --
- Q Let me finish the question.

Let's assume for the sake of argument right now
that that price is X dollars. That means that publisher,
under my assumption, is quite content to sell that song
for X dollars for television network use.

Now, your approach by the television producer of the program that wants to use April -- in fact, let's say he tells you, "I can use Misty, which I think is fairly interchangeable with your song, for X dollars; what is your bid?"

Now, would you explain to me how, in those circumstances, you feel that you are somehow being affected by a ceiling price?

- A Are you finished with the question?
- Q Yes, I am.
- A Let us examine why the publisher of Misty leaves his song in the ASCAP reservoir. He leaves it

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because he knows if he removes it, his song is going to

be relegated to the same fate as I'll Remember April;

that it is a song which can be easily interchanged, and he

bas no position. He cannot get the songs before CTM.

It is that simple.

I guess what I am trying to get at, Mr. Chiantia, is under the hypothetical situation I have just described, is there any difference from a situation in a competitive market where the publisher of Misty bids X price and you are asked by the producer of the program to come up with your own price?

A Mr. Hruska, you keep talking about competition.

You are talking about something completely different from what I understand.

The price of Misty is established in a context which you have developed. You have created conditions in which this so-called competitive world exists and I submit to you that that is not a competitive world.

Q I don't believe the answer is responsive.

A I think it is responsive because the question becomes --

THE COURT: I am not sure whether this questioning and answering can help to get us anywhere. It seems
to me it is a argument, primarily, of economic theory and

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I don't think that even Mr. Chiantia holds himself forth as an economic expert. He is giving his reactions to what he believes would be his responses, if the situation of the requested per use program were in effect.

So may I ask you this:

At the present time Misty is priced at something by its publisher.

A Under the present system, Judge?

THE COURT: Yes, under any system, including the present system.

However, it is not priced by CBS, it is not priced by the Court or anybody else. It is priced independently by its own publisher or owner.

Let's assume that is \$10 or \$50, or whatever -- \$100 -- I don't know what is a logical figure.

come to you and they think April is something that would be worthwhile, telling you, as Mr. Hruska indicated before, that they are thinking of using M. ty out they don't want to pay X dollars.

What would your present response be under those circumstances? Would you bid against that price that he mentions as being Misty's price?

Well, if I felt that the price were reasonable,

I would, sir, yes.

THE COURT: And if you felt it weren't reasonable, you would not?

A I would not, that's correct.

to paint you into a corner but to understand your point of view toward the subject, you would, in effect, be bidding against whatever song he mentions to you and whatever the price of that song was but it seems to me that the significant difference in your mind is that the price you are bidding against under the present system is a price that is set in so far as possible by the market and by independent forces.

- A That's correct.
 - THE COURT: At least, as you view it.
- A That's right, sir.

THE COURT: And the price you would be bidding against under the proposed arrangement would be, in effect, a fixed price?

- A That's correct.
- Q Of course, for performance rights, you don't set any prices at all, do you?
 - A That's correct.
 - Q That is all done through ASCAP?

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Fox agency and they say, "I am interested in Misty and

Now, the producer of the film calls up the Harry

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I am interested in April; get me bids," and Miss Mingle says, "Well, I know Misty is \$500" and the producer says, "Well, I want a price on April," and so Miss Mingle calls you and she probably tells you that the producer was interested also in Misty and that the price is \$500 for this type of time.

Do you bid in those circumstances?

A I would indicate what fee I wanted and if I felt that the fee of \$500 was too low, I would say count me out: I won't license.

Q But you wouldn't feel that you were somehow operating under some artificial ceiling, would you?

A No, but that was the ceiling which -- that was the price that was fixed by the purchaser, himself.

It was not imposed upon him by anyone.

It's an open market. He has a right to get as little or as much for the song as he can.

I have the same right. If he wants to give away his catalog and go to hell in a handwagon, that's his prerogative. That doesn't mean that I have to.

If he continues to license Misty at \$500, I don't know that he is going to have the catalog or Misty.

Q You don't have the right with respect to nondramatic performance rights to get as much as the market

A I am sorry. I don't follow that.

Q I see. Well, let's take an ASCAP agreement.

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with the All Industry Television Station Committee and

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let's say that that contract runs four or five years, which I understand is really standard, and you withdraw that repertory from the ASCAP repertory within the first year that ASCAP signs that agreement with the All Industry Committee.

Do you understand that ASCAP has the right to continue to license all those stations under that agreement until the expiration of the agreement?

MR. TOPKIS: There is no question about it, your Honor. It does.

THE COURT: But the question is whether Mr. Chiantia understands that.

MR. TOPKIS: I submit that that is irrelevant.

THE COURT: I am not sure it's irrelevant.

He has just talked about the right to withdraw and I think

Mr. Hruska has the right to be sure that the witness

understands what the limitations are on the right to with
draw and see whether that affects his attitude in any way.

MR. TOPKIS: Okay.

THE COURT: Do you understand the question?

A Yes, I do.

And you believe you hafe the right to withdraw your repertory from ASCAP in the absence of your writer's consent?

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Well, that is very, very serious legal question but I expressed an opinion when I went into the Minnesota Mining deal, as you recall.

There is a question about that and if it really -if push came to shove, I think I would have to consult counsel and do wat I think is right.

- Q Is the answer then you don't know?
- I don't know what?
- Q You now do not know whether you have the right to withdraw your catalog from the ASCAP reportory in the absence of your writer's consent?

A I know one thing, that I can direct license and I have direct licensed and that is withdrawing the catalog with respect to that particular use, and I have done that.

- Q You have the right to direct a license for television use a song which was composed by an AGAC writer?
 - Under certain circumstances, yes.
 - For television use? Is that your understanding?
- No. Under certain circumstances, if I get his A permission, I have the right to license.
- I didn't say that, sir. I said without his conxent.
 - I'm sorry. Without his consent, no. Q I take it you are talking about a feature use,

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a feature use on television.

- Yes.
- Yes.
- What about a thems and background?
- I can license buckground music without -- background use without his permission.
 - Ti he is an AGAC write:?
- If he is an AGAC writer, that's correct, providing the song is less than ten years old.
 - Well, there is no point in debating it.
 - Well, no, don't debate it, read the agreement.
- I think you are in error, sir. The contract will speak for itself.
- THE COURT: You say provided the song is less t:an ten years old?
 - That's correct, sir.
- I believe you are talking about synchronization rights.
- That's right. I am talking about synchroniza-A tion.
 - My question was addressed to performance rights. Q
 - I'm sorry. A
- You testified this morning about the 65 or so Q publisher-members of the NMPA. Incidentally, was there

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Chiantia-cross

a name for the NMPA prior to its present name?

A Yes. It was called the Music Publishers
Protective Association.

- Q Do you know the former name of AGAC?
- A Yes, SPA -- Songwriters Protective Association.

MR. TOPKIS: And the Mafia is called the Honor Society and can't we stop this nonsense.

MR. FRUSKA: We will get no the Mafia a little later on.

THE COURT: I used to practice law. I remember what trade associations do.

Q I think Mr. Topkis put the question to you or you give the answer in terms of there are some of those 65 publishers who are really publisher groups.

Isn't it the fact, Mr. Chiantia, that the vast prependerance of those 65 are publisher groups as distinguished from individual publishing companies?

A I really don't know if that is the case.

(ertainly that would be true with respect to, let's say,

the 10 or 12 leading publishers, but I don't know that it

is the case with respect to the others.

- Q There are 10 or 12 leading publisher groups?
- A I would say so, yes.
- Q These separate publishing entities that you

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referred to as being part of a publisher group, isn't it true that a large number of those separate entities are co-owned by writers of music?

In other words, they would consist of a corporation, half the stock of which or some portion of the stock of which is owned by the publisher and the other portion owned by the writer?

A It's certainly not the case with MCA. It's certainly not the case with Warner Brothers. It's certainly not the case with Mills Music.

It was certainly not the case in the Big 3.

Perhaps you can pinpoint it for me.

Q You know of none of the publishing companies of the publisher groups you have just mentioned which are owned in part by writers of music?

- A I don't think that was your question.
- Q Yes. It is now my question.
- A No, that was not your question. I think you said that in many of these --

THE COURT: Apparently there has been a failure of communication.

Do you want to ask the question again, put it more clearly?

MR. HRUSKA: Yes.

(E)



